Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CAPITAL CASE

WILLIAM VAN POYCK,
Petitioner,

vs.

HARRY K. SINGLETARY, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

-CAPITAL CASE-

The questions presented in this CAPITAL CASE by the petition are:

1. IN A CASE IN WHICH THE PETITIONER WAS FORCED TO USE THE MAJORITY OF HIS PEREMPTORY CHALLENGES TO REMOVE JURORS WHO SHOULD HAVE BEEN REMOVED FOR CAUSE, AND IN WHICH TWO BIASED, PRO-DEATH JURORS ULTIMATELY SAT ON THE JURY, DID THE SUPREME COURT OF FLORIDA MISAPPLY ROSS V. OKLAHOMA WHEN IT IMPROPERLY FOCUSED ON THE JURORS WHO WERE EXCUSED INSTEAD OF ON THE JURORS WHO ULTIMATELY SERVED?

2. WAS THE PETITIONER DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WHEN HE WAS IMPROPERLY AND ARBITRARILY DEPRIVED OF SEVEN OF HIS TEN PEREMPTORY CHALLENGES AND, AS A RESULT, AT LEAST TWO OBJECTIONABLE, BIASED JURORS ACTUALLY SAT ON THE JURY?

3. DID THE SUPREME COURT OF FLORIDA MISAPPLY THIS COURT'S HOLDINGS IN ROSS V. OKLAHOMA AND MORGAN V. ILLINOIS WHEN IT HELD THAT JURORS WHO ARE FIRMLY CONVINCED OF THE PETITIONER'S GUILT AND WHO ARE UNALTERABLY IN FAVOR OF BRINGING THE DEATH PENALTY ARE NEVERTHELESS NOT EXCUSABLE FOR CAUSE WHEN THEY SUBSEQUENTLY AFFIRMATIVELY ANSWER SOME GENERAL "FAIRNESS AND FOLLOW THE LAW" QUESTIONS? AND, IF SO, WAS THE PETITIONER DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY WHEN AT LEAST TWO BIASED, PRO-DEATH JURORS ULTIMATELY SAT ON THE JURY?

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PETITION FOR WRIT OF CERTIORARI

Petitioner William Van Poyck, a state prisoner under sentence of death, respectfully moves this Honorable Court to issue a writ of certiorari to review the opinion of the Supreme Court of Florida, entered on May 14, 1998, with rehearing denied on August 7, 1998.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (a 4-3 split decision) is reported as Van Poyck v. Singletary, 715 So. 2d 930 (1998), and appears in Petitioner's Appendix at A2 through A27. The Supreme Court of Florida's order denying rehearing appears in the Appendix at B1.

STATEMENT OF THE BASIS FOR JURISDICTION

1. The opinion of the Supreme Court of Florida sought to be reviewed was rendered on May 14, 1998.

2. Petitioner's timely motion for rehearing was denied on August 7, 1998.

3. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1257(a), and Rule 10(c).

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition raises issues under the Sixth and Fourteenth Amendments to the United States Constitution:

> **SIXTH AMENDMENT:** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

> **FOURTEENTH AMENDMENT:** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Basis for Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to Rule 10(c), Rules of The Supreme Court of The United States, in

that the Court below, the Supreme Court of Florida, has decided important constitutional questions in a way which conflicts with relevant decisions of this Court. The issues raised herein were first reviewed in a petition for writ of habeas corpus filed in the Supreme Court of Florida as a collateral proceeding in this capital case.

B. Underlying Facts and Proceedings Below

The evidence presented at Van Poyck's original trial has been summarized by the Supreme Court of Florida. See Van Poyck v. State, 564 So. 2d 1066, 1067-68 (Fla. 1990). Briefly, the record reflects that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a prisoner at Glades Correctional Institution, to a West Palm Beach dermatologist's office. After they pulled into a parking space behind the office they were confronted by Van Poyck and his co-defendant, Frank Valdes, both of whom were armed. Van Poyck took Turner's gun and forced him under the van. While under the van, Turner "saw Griffis exit the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground." Id. at 1067. The Supreme Court of Florida held that the evidence presented was insufficient to establish first-degree premeditated murder against Van Poyck, but affirmed Van Poyck's first-degree murder conviction on the basis of felony murder, while noting that Van Poyck was not the triggerman. Id. at 1069. This Court subsequently denied certiorari review. Van Poyck v. Florida, 499 U.S. 932 (1991).

In December, 1992, Van Poyck filed a motion to vacate the judgment of conviction and sentence pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The trial court denied the motion and a divided Supreme Court of Florida, split 4-3, affirmed. Van Poyck v. State, 694 So. 2d 686 (Fla. 1997). This Court denied certiorari review on December 1, 1997. Van Poyck v. State, _ U.S. _, 118 S. Ct. 559, 139 L.Ed.2d 400 (1997).

In February, 1997, while his appeal of the Rule 3.850 motion denial was still pending, Van Poyck filed a petition for writ of habeas corpus before the Supreme Court of Florida. The petition

presented three claims, the first of which was ineffective assistance of counsel on appeal. On May 14, 1998, a sharply divided Supreme Court of Florida, again split 4-3, denied the petition. Van Poyck v. Singletary, 715 So. 2d 930 (Fla. 1998). Subsequently, on August 7, 1998, Van Poyck's timely motion for rehearing was denied. See Appendix at A1 and B1.

C. Facts Pertaining to Questions Presented

In Van Poyck's direct appeal, his appointed appellate attorney, William Lasley, submitted a brief arguing, *inter alia*, that Van Poyck had been denied a fair and impartial jury because the trial court improperly denied numerous motions to strike various prospective jurors for cause due to their bias in favor of the death penalty. The argument supporting this claim consisted solely of a single paragraph and cited no case law whatsoever. Mr. Lasley named two specific jurors who he alleged should have been excused for cause, to wit: jurors Abufaris and Bruschi. Unfortunately for Van Poyck, and for reasons unknown at the time, Mr. Lasley had named the *wrong two jurors*: prospective jurors Abufaris and Bruschi were later excused for personal reasons and Van Poyck was never required to use peremptory challenges to strike them. It is undisputed that attorney Lasley should have named jurors Moody and Bradford—two jurors unsuccessfully challenged for cause and who ultimately sat on the jury. Furthermore, Mr. Lasley also should have named seven other jurors who were unsuccessfully challenged for cause and against whom Van Poyck used seven of his ten peremptory challenges.[1]

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[1]The reasons behind Mr. Lasley's incompetent handling of this issue on direct appeal became apparent some eight years later. After the state habeas corpus petition was filed, but prior to oral argument, Van Poyck's pro bono attorneys learned for the first time that Mr. Lasley had been mentally ill and drug addicted during the direct appeal; he was repeatedly hospitalized and also entered numerous drug rehabilitation programs. Mr. Lasley was subsequently arrested for felony possession of crack cocaine, to which he pled not guilty by reason of insanity. Lasley later pled nolo contendre and was suspended from the practice of law by the Supreme Court of Florida. Van Poyck moved, in his pending habeas petition, to amend his petition to include these newly discovered facts and to expand his ineffective assistance of counsel claim to one of per se ineffectiveness. Curiously, the Supreme Court of Florida never ruled on the motion to amend, a point Van Poyck argued in his motion for rehearing. The denial of the rehearing motion makes no mention or reference to the motion to amend.

At Van Poyck's trial, defense counsel used all ten of his allotted peremptory challenges, complained that the judge had forced him to use several of those challenges on jurors who should have been excused for cause, and requested additional peremptory challenges to use against jurors Moody and Bradford. In response, the court offered to make a "deal" with defense counsel: the court would grant an additional peremptory challenge, but only if counsel agreed to allow the judge to excuse for cause a prospective juror (Mr. Chase) who had not yet been questioned on voir dire:

> MR. DUBINER: Do we get the additional peremptory?
>
> THE COURT: I am going to make a bargain with you, that the Appellate Court won't like if it ever gets up there. I will go along with that, if that guy Chase gets up there, he goes for cause. That's the guy in the methadone program.

R.1364. Defense counsel properly declined to accept this "bargain," and the Court refused to grant any additional peremptory challenges. Accordingly, jurors Moody and Bradford sat on the jury.[2]

On direct appeal, the Supreme Court of Florida denied Van Poyck's fair and impartial jury claim—unsurprising since Mr. Lasley had named the wrong two jurors:

> We note, that although the pro-death jurors should have been excused for cause, the trial judge subsequently excused them for personal reasons. Consequently, Van Poyck was not required to exercise any peremptory challenges with regard to those jurors and that issue is moot.

Van Poyck v. State, 564 So. 2d 1066, 1071 (Fla. 1990).

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[2]Under state rule and law, as well as the due process clause, both the state and the defense have an unequivocal right to voir dire prospective jurors before they can be excused for cause. The Supreme Court of Florida has made it clear that it is reversible error to refuse to permit defense counsel to voir dire a prospective juror before the Court excuses him or her for cause, as a matter of due process. See O'Connell v. State, 480 So. 2d 1284 (Fla. 1985).

In February, 1997, Van Poyck's pro bono attorneys filed a petition for writ of habeas corpus in the Supreme Court of Florida, raising, *inter alia*, a claim of ineffective assistance of counsel on appeal; its caption read:

> Mr. Van Poyck received ineffective assistance of counsel on his direct appeal when appellate counsel failed to adequately raise the issue of the trial court's error in refusing to grant defense challenges for cause regarding jurors who indicated that they would automatically vote for death, and who were convinced of Mr. Van Poyck's guilt, contrary to the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

Van Poyck argued that appellate counsel's performance had been deficient because he devoted only one paragraph to the claim, cited no supporting case law whatsoever, failed to name or mention the seven biased, pro-death and pro-guilt jurors who were unsuccessfully challenged for cause and against whom Van Poyck had to use seven of his ten peremptory challenges, and, most important, instead of naming the correct two jurors who ultimately sat on the jury (jurors Moody and Bradford), he inexplicably named two jurors (Abufaris and Bruschi) who had been excused by the judge for personal reasons and hence were immaterial.

In support of the contention that the trial court erred in refusing to grant defense challenges for cause (and hence that appellate counsel's failure to adequately argue the issue on appeal amounted to ineffective assistance), Van Poyck compared the voir dire responses of potential jurors the Supreme Court of Florida deemed pro-death and excusable for cause to the responses of jurors who actually sat on the jury. Specifically, because the Supreme Court of Florida had, on direct appeal, agreed that Abufaris and Bruschi were pro-death and should have been excused for cause, Van Poyck compared their responses to those of the seven jurors he alleged also should have been excused for cause (prospective jurors Busto, Moker, Carter, Nickerson, Miller, Farmer and Aldridge) and against whom Van Poyck was forced to use seven of his ten peremptory challenges. Because the voir dire responses of these seven were virtually identical to or even more biased than those of

Abufaris and Bruschi, Van Poyck reasoned that these seven also should have been excused for cause.

In analyzing the voir dire responses of the seven jurors, Van Poyck argued that Busto, Moker, Carter, Nickerson, Miller and Farmer were unalterably in favor of death and would automatically impose it upon conviction, while Busto, Farmer and Aldridge were also already convinced of Van Poyck's guilt based on media accounts they had read or seen. Although Van Poyck also alleged that jurors Moody and Bradford (the two jurors who ultimately served after being unsuccessfully challenged for cause) were pro-death, he did not specifically set out their voir dire responses because under state law it is only necessary that an "objectionable" juror be seated—*i.e.*, one who the defendant did not want seated and against whom he would have used a peremptory challenge had he any peremptory challenges left.[3]

In his habeas corpus petition, as summarized below, Van Poyck set out the voir dire responses of the seven prospective jurors who he alleged should have been excused for cause. First, Wilma Busto evidenced a clear bias in favor of the death penalty, and stated that she would require Van Poyck to submit evidence of his innocence:

THE COURT:	Do you feel that you, personally, could sit on a jury and hear the evidence and hear my instructions on the law and follow them and personally make a recommendation of death?
MS. BUSTO:	Yes.
THE COURT:	Do you feel in the alternative that you could personally recommend life?

[3]Under well-established Florida case law, it is reversible error for the trial court to improperly deny a challenge for cause; providing that the defendant exhausts all of his peremptory challenges, moves for additional peremptories, is denied, identifies a juror he will excuse if granted a peremptory, and an objectionable juror thereafter sits on the jury. See, e.g., Trotter v. State, 576 So. 2d 691 (Fla. 1990); Diaz v. State, 608 So. 2d 888 (Fla. Dist. Ct. App. 1992). All of these elements were present in Van Poyck's case.

MS. BUSTO: No.

THE COURT: You think you would recommend death in all cases?

MS. BUSTO: If I considered that the person is a criminal . . . .

R.724-725.

* * * * * * * * * * * * * * * * * * *

THE COURT: Suppose an aggravated factor, that aggravated factor is presented, can you conceive of an aggravating factor of somebody having a prior record, being a criminal, would you conceive of a case where you could bring back a life recommendation even with that aggravating factor knowing the person is a criminal?

MS. BUSTO: No. If he's already a criminal, he's going to be a criminal. That's the way I think about it.

MR. KLEIN: Only appropriate sentence in a case where somebody like that who's already criminal would be death.

MS. BUSTO: Yeah.

R.728-729.

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MR. KLEIN: Would you, if you knew that, let's put it this way, Miss Busto, would you make me present any evidence on behalf of the defendant to prove that . . .

MS. BUSTO: Yes.

MR. KLEIN: . . .that he was innocent?

MS. BUSTO: Yes. I would like to see some proof, yes.

R.730. Second, Linda Moker also demonstrated an unacceptable bias for the death penalty:

MR. KLEIN: Suppose the case involves the shooting of a police officer or prison guard. Would you think that kind of first degree murder if it was done in premeditation would automatically warrant the death penalty?

MS. MOKER: Yes, I believe so.

MR. KLEIN: Are there any circumstances that you can think of under which you would not recommend the death penalty other than that kind of case involving a premeditated killing of a police officer or a prison guard?

MS. MOKER: Premeditated, no, I don't think so.

MR. KLEIN: Do you feel strongly about that? How strong is that belief?

MS. MOKER: Quite strong.

R.641-642. Van Poyck challenged Ms. Moker for cause, just as he had challenged Ms. Busto, and the court likewise denied the motion. As with Ms. Busto, Van Poyck was forced to use a peremptory challenge against Ms. Moker. R.1131-32.

Third, Charles Carter similarly evidenced a pro-death penalty bias:

MR. DUBINER: If you found someone guilty of premeditated first degree murder and let me even add something else, pre-

meditated first degree murder of a police officer or prison guard would you think that the death penalty would be an appropriate penalty in that case?

MR. CARTER: I think it would be the appropriate punishment regardless of whether it was a civilian or officer.

MR. DUBINER: That's just because its premeditated?

MR. CARTER: Exactly.

MR. DUBNER: In a premeditated first degree murder case, then you think that the appropriate punishment is the death penalty?

MR. CARTER: Yes.

MR. DUBINER: And you feel that way in basically all premeditated first degree murder cases. We're talking about premeditated, not other types.

MR. CARTER: Yes.

R.842-843. Mr. Carter was challenged for cause, which the court denied. R.844. Mr. Carter was then struck via one of the defendant's peremptory challenges. R.1207.

Fourth, Ronald Nickerson demonstrated a pro-death penalty bias and an inability to follow the Court's instructions:

MR. KLEIN: I don't know whether I'm overstepping my bounds or not, but Mr. Nickerson, initially, at least, do you have any preconceptions about what kind of a case would deserve the death penalty?

MR. NICKERSON: Most any kind of a premeditated murder deserves the death penalty.

MR. KLEIN: You say most any kind. Do you feel

> so strongly about the death penalty that you think you would vote for it, for death in any kind of case where you found the Defendant guilty of premeditated murder?

MR. NICKERSON: I probably would.

R.457.

* * * * * * * * * * * * * * * * * * *

THE COURT: Would you follow these instructions irregardless [sic] of your personal views? Because I am telling you, you have to follow them?

MR. NICKERSON: I, I probably would, but I did not know for sure. I would have to hear all of the evidence.

R.458-59. The trial Court denied Van Poyck's for cause challenge to Mr. Nickerson, R.460, and the defense used yet another peremptory challenge to strike him. R.1283.

Fifth, Derek Miller also demonstrated an unacceptable pro-death penalty bias:

THE COURT: Okay, would you agree, sir, that it is a fair statement that capital punishment or the death penalty is not an appropriate sentence in all first degree murder cases, that it depends on the case?

MR. MILLER: Right. The thing is, if a person is without doubt proven guilty, you know, for a rape or murder, I believe, you know, death ought to be the sentence.

THE COURT: In every case no matter what?

MR. MILLER: Without a doubt, yes, if it's proved without a doubt.

R.628-29.

MR. KLEIN: Mr. Miller, you told us before that you would consider yourself strongly in favor of the death penalty, capital punishment?

MR. MILLER: Yes, sir.

MR. KLEIN: This is a recently held belief or have you felt that way before?

MR. MILLER: I felt that way a long time. Feel more strongly about it because of the prison overcrowding, the taxpayer's money, you know, you know, going to house and feed those . . . .

R.632.

MR. KLEIN: Would you feel that same way if you were to know that the alternative to the death penalty that a person should spend the rest of his life in prison, you as a taxpayer would have to house and feed him for the rest of his natural life, would you, would you feel hesitant to give a life recommendation under those circumstances?

MR. MILLER: Yes.

R.634. The Court denied Van Poyck's challenge for cause, R.636, and Van Poyck used another peremptory challenge. R.1206.

Sixth, George Farmer showed both a pro-death penalty bias and a presumption that Van Poyck was guilty:

MR. KLEIN: Are there some mitigating circum-

stances under those circumstances that could convince you to bring back a recommendation of life?

MR. FARMER: As opposed to the death penalty?

MR. KLEIN: Yes.

MR. FARMER: Yes, I think I would as long as you did not plan to do it, then a murder ended up happening. I mean, you plan to escape and all this stuff and you have this big plan all made up. And if somebody gets killed, it's okay; if somebody did not get it, killed, it's okay to then, that would mean you really did not plan ahead of kill somebody.

MR. KLEIN: Okay, what about . . . .

MR. FARMER: Make sense?

MR. KLEIN: Yeah, it does actually. What about if the case, how do you feel if the case involved the death of a prison guard, police officer, you feel the same way?

MR. FARMER: No, I guess I would have to change my mind on that.

MR. KLEIN: Okay. Why would that be?

MR. FARMER: Because these guys are trying to do a service to society and they are trying to be protected as well as they could be.

MR. KLEIN: Okay. Well, how would you feel, generally, about somebody if you knew they intentionally killed a police officer or a prison guard?

MR. FARMER: I would have to bring the death penalty.

R.659-61.

MR. KLEIN: From, as a result of what you have heard or heard around you, on TV about the case, you feel that Mr. Van Poyck is guilty as he sits here?

MR. FARMER: You know, I do not know what evidence you're going to bring in both directions.

MR. KLEIN: From what you have read?

MR. FARMER: From what I've read, this man is accused of this crime.

MR. KLEIN: Well, from what you read and what you think he's probably guilty?

MR. FARMER: Okay, yeah, I think he's probably guilty.

R.662-63. The Court denied Van Poyck's challenge for cause, R.665, and defense counsel was forced to use yet another peremptory challenge. R.1354.

Finally, Frank Aldridge demonstrated a presumption of Van Poyck's guilt, which he "hoped" he could put aside. Yet he would require Van Poyck to present evidence of his innocence:

THE COURT: What you read in the paper, did it really stick with you, I mean or did you breeze through it?

MR. ALDRIDGE: I read it in the paper Monday morning because I was coming to jury duty, it stuck in my mind.

THE COURT: That's a recapitulation or where they go back?

MR. ALDRIDGE: Uh-huh.

THE COURT: Could you disregard what you've read in that article Monday and base the verdict solely on what you hear in the courtroom and the instructions of the law I would give you?

MR. ALDRIDGE: I don't know.

THE COURT: Have you formed an opinion as to the person's guilt or innocence based on that article in the paper? Obviously, we want a jury to find a person guilty or not guilty based on what they hear in the courtroom, not on what you read in the paper. Could you do that?

MR. ALDRIDGE: I understand that, but possibly I have formed an opinion.

R.696-97.

MR. KLEIN: Mr. Aldridge, as a result of what you have read, have you formed any opinion, at all, about this case or about Mr. Van Poyck?

MR. ALDRIDGE: Based on the facts presented in the newspaper, my opinion is that the defendant is guilty.

MR. KLEIN: Okay. Based upon what you read, would you have, would you, before you could bring back a verdict of not guilty, would you ask for us as defense to present evidence to persuade you otherwise?

MR. ALDRIDGE: Yes, certainly.

MR. KLEIN: Would you have a difficult time find-

ing Mr. Van Poyck not guilty unless you heard some evidence from the defense to convince you that he was innocent in view of what you have heard?

MR. ALDRIDGE: Yes, in view of what I have read, yes.

THE COURT: Mr. Aldridge, let me ask you something. If I instructed you that under the law of our country, that under the constitution Mr. Van Poyck as he sits here right at this moment is presumed innocent and that presumption stays with him until the time the state presents evidence sufficient for you to find him guilty beyond a reasonable doubt, would you be able to follow that instruction?

MR. ALDRIDGE: I would hope that I could.

R.703-04.

* * * * * * * * * * * * * * * * * *

THE COURT: Would you be able to follow that if you were a juror and not form an opinion or fix in your mind a verdict until you have heard all of the evidence in the courtroom?

MR. ALDRIDGE: I would hope that I could.

* * * * * * * * * * * * * * * * * *

THE COURT: Also, under our system the defendant in any criminal case is not required to testify nor present evidence. The reason for that is that the burden of proof in a criminal case is on the state, not on the defense. Would you agree with that?

MR. ALDRIDGE: Yes.

THE COURT: Would you be able to do that even if you read the papers?

MR. ALDRIDGE: I would hope that I could.

R.705. The Court denied Van Poyck's motion to remove Mr. Aldridge for cause, R.706, and Van Poyck used a peremptory challenge to prevent him from sitting. R.1132.

Subsequent to the exchanges summarized above, defense counsel challenged Mary Bradford for cause, and was denied. R.871, 873. As a result, this objectionable juror actually sat on the jury. Had Van Poyck received the additional peremptories he should have received, or had he not been required to use his peremptories on jurors who should have been excused for cause, he would have struck Ms. Bradford.

Defense counsel next moved to strike Goldie Moody for cause, and was denied. In response, defense counsel moved for an additional peremptory challenge, at which point the Court countered with its illegal, unorthodox "bargain" discussed above (in which the Court conditioned its granting of any additional peremptory challenges upon defense counsel's willingness to waive his right to voir dire potential juror Chase and allow Mr. Chase to be excused for cause without any examination). R.1364-65. Defense counsel declined the proposed "bargain," and jurors Moody and Bradford sat on Van Poyck's jury. At the end of voir dire, defense counsel Michael Dubner moved to strike the entire panel on death qualification. R.1368-69. The motion was denied.

On May 14, 1998, the Supreme Court of Florida denied Van Poyck's petition for writ of habeas corpus. Van Poyck v. Singletary, 715 So. 2d 930 (1998). In denying this claim, the Court reached the merits even though the claim was framed in terms of ineffective assistance of appellate counsel. Although the majority of the condemned the "bargain" which the trial court had attempted to force upon the defense in exchange for additional peremptories, the Court held that none of the seven juror's voir dire response exhibited the bias necessary to excuse them for cause.

In reaching its result, the Court reasoned that general "fairness and follow the law" questions put to the seven jurors by the court and the prosecutor had elicited responses sufficient to negate the jurors' prior statements of partiality. In contrast to its analysis of the seven excused jurors, at no point in its opinion did the court focus on the voir dire responses of jurors Moody and Bradford—the two jurors who actually served on the jury. Nor did the Court even purport to consider whether they were biased or partial, or otherwise should have been excluded for cause. In other words, the court improperly focused on the jurors who were excused, rather than on the biased, pro-death jurors who actually sat on the jury.

As for Van Poyck's comparison of the voir dire responses of the seven jurors with the voir dire responses of prospective jurors Abufaris and Bruschi (who a unanimous Supreme Court, on direct appeal, had held should have been excluded for cause due to their pro-death penalty bias), the Court cured this apparent contradiction by mysteriously "revisiting" Van Poyck's 1990 direct appeal decision and somehow concluding that, on second thought, Abufaris and Bruschi were not so biased as to be excludable for cause.

In dissent, Justices Anstead, Shaw and Chief Justice Kogan responded that, at a minimum, prospective jurors Aldridge, Nickerson and Miller had clearly exhibited a pro-death penalty and/or pro-guilt bias sufficient to cause them to be excludable for cause. The dissent examined their voir dire responses and compared them with prior decisions from the Court, finding clear error by the trial Court in not excusing them for cause. Significantly, in a holding not disputed (or even addressed) by the majority, the dissent focused on the two jurors—Moody and Bradford—who actually served on Van Poyck's jury: "As a result, two pro-death jurors actually sat on his jury." Van Poyck v. Singletary, 715 So. 2d 930, 938 (1998). The dissent condemned the majority for blatantly violating the law of the case doctrine by "revisiting" the Court's prior 1990 direct appeal decision and changing the facts "without so much as a hint of explanation or justification." Id. at 939. The dissent concluded by stating:

> The "bottom line" in this case is that when our established case law is properly applied to the juror qualification issues raised here, it demonstrates that a number of challenges for cause were erroneously denied and the defendant, now a convicted and death-sentenced defendant, was substantially prejudiced thereby.

Id. at 940.

REASONS FOR GRANTING THE WRIT

This capital case presents this Court with an opportunity to reverse an unconstitutionally imposed sentence of death, and to provide guidance to the Supreme Court of Florida where that Court has misconstrued and misapplied this Court's holding in Ross v. Oklahoma, 487 U.S. 81 (1988), by improperly focusing on jurors who were excused instead of on jurors who ultimately sat on the jury.

This case also presents this Court with an opportunity to decide a question left unsettled in Footnote 4 of Ross v. Oklahoma, regarding under what circumstances a state trial court's deprivation or impairment of a defendant's right to exercise peremptory challenges rises to the level of a denial of due process under the Fourteenth Amendment.

Finally, this case will allow this Court, for the first time, to forcefully articulate when and under what circumstances prospective capital jurors who have unequivocally demonstrated they will automatically vote for death (and some who are firmly convinced of the defendant's guilt), may be deemed "rehabilitated" and fit to serve, and whether their responses to some general "fairness and follow the law" questions suffices under Morgan v. Illinois, 504 U.S. 719 (1992), to erase their previous unequivocal responses on voir dire.

ARGUMENT I

IN A CASE IN WHICH THE PETITIONER WAS FORCED TO USE THE MAJORITY OF HIS PEREMPTORY CHALLENGES TO REMOVE JURORS WHO SHOULD HAVE BEEN EXCUSED FOR CAUSE, AND IN WHICH TWO BIASED, PRO-DEATH JURORS ULTIMATELY SAT ON THE JURY, DID THE SUPREME COURT OF FLORIDA MISAPPLY ROSS V. OKLAHOMA WHEN IT IMPROPERLY FOCUSED ON THE JURORS WHO WERE EXCUSED INSTEAD OF ON THE JURORS WHO ULTIMATELY SERVED?

In Ross v. Oklahoma, 487 U.S. 81 (1988), the defendant presented this Court with two claims. The first was that he had been denied a fair and impartial sentencing jury in violation of the Sixth and Fourteenth Amendments because the state trial judge had refused to remove for cause a juror who had declared that he would automatically vote for death if the defendant was found guilty. The defendant used one of his peremptory challenges to remove that biased juror. Thus, that juror did not serve on the jury. Nor did any other biased or objectionable jurors serve on the jury, for the defendant did not move to excuse for cause or otherwise object to any of the jurors who ultimately served on the jury.

Notwithstanding this, the defendant, relying on language in Gray v. Mississippi, 481 U.S. 648 (1987), argued that because "the composition of the jury panel as a whole could possibly have been affected by the trial court's error," he was deprived of a fair and impartial jury. The Ross Court rejected defendant's argument and held that Gray's "broad language" that the "relevant inquiry is whether the composition of the jury panel as a whole could possibly have been affected by the trial court's error," was "too sweeping to be applied literally." The Ross Court "declin[ed] to extend the rule of Gray beyond its context: the erroneous 'Witherspoon exclusion' of a qualified juror in a capital case." Ross, 487 U.S. at 87-88. Instead, the Court held:

> It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury. [citations omitted]. Had [the juror] sat on

> the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [the juror] for cause, the sentence would have to be overturned. Adams, supra. But [the juror] did not sit. Petitioner exercised a peremptory challenge to remove him, and [the juror] was thereby removed from the jury as effectively as if the trial court had excused him for cause. *Any claim that the jury was not impartial, therefore, must focus not on [that juror], but on the jurors who ultimately sat.* None of those 12 jurors, however, was challenged for cause by petitioner, and he has never suggested that any of the 12 was not impartial.

Id. at 85-86. [emphasis added]. In contrast to the defendant in Ross, Van Poyck not only complained about the seven jurors who should have been removed for cause and against whom Van Poyck had to use seven of his ten peremptory challenges, but also complained about the two jurors who ultimately sat: Moody and Bradford. Van Poyck moved to have Moody and Bradford excused for cause, and was denied. Having no more peremptory challenges, and having been denied for additional peremptory challenges, Van Poyck was forced to accept Moody and Bradford.

In denying Van Poyck's habeas corpus petition, the majority of the Supreme Court of Florida focused *solely* on the seven jurors against whom Van Poyck had been forced to use peremptory challenges. Analyzing the voir dire responses of those seven, four of the seven Justices determined that none of the seven jurors was so biased or partial to require removal for cause. Thus, the Court reasoned, Van Poyck was not unfairly deprived of his peremptory challenges.

Van Poyck's claim, however, was never simply about whether he was improperly deprived of peremptory challenges. Rather, as evidenced by the caption and argument in his habeas corpus petition, the claim was about whether, as a result thereof, Van Poyck was also denied a fair and impartial jury when at least two biased jurors *actually sat on his jury*.

The Supreme Court of Florida ignored this aspect of Van Poyck's claim. Indeed, the majority of the Court never disputed that

two biased, partial jurors actually sat on the jury. The three dissenting Justices observed that: "As a result, two pro-death jurors actually sat on his jury." Van Poyck v. Singletary, 715 So. 2d 930, 938 (1998) (Justices Anstead, Kogan and Shaw, dissenting). Accordingly, the majority of the Florida Supreme Court answered the wrong question and contravened this Court's standard set forth in Ross by improperly and exclusively focusing on the jurors who were excused, instead of on the jurors who actually served.[4]

The Supreme Court of Florida's disposition of this issue demonstrates that it misapplied the relevant legal standards, and unless corrected it will continue to apply the wrong standards to the prejudice of future defendants. Because two pro-death jurors actually sat on Van Poyck's jury, in contravention of Ross and Adams v. Texas, 448 U.S. 38 (1980), Van Poyck was deprived of the fair and impartial jury guaranteed by the Sixth and Fourteenth Amendments. Accordingly, the death sentence at bar cannot stand.

ARGUMENT II

WAS THE PETITIONER DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WHEN HE WAS IMPROPERLY AND ARBITRARILY DEPRIVED OF SEVEN OF HIS TEN PEREMPTORY CHALLENGES AND AT LEAST TWO OBJECTIONABLE, BIASED JURORS ACTUALLY SAT ON THE JURY?

This claim presents the Court with an opportunity to resolve important issues left unsettled in Ross v. Oklahoma, 487 U.S. 81 (1988): whether improperly requiring a defendant to exercise peremptory challenges to remove potential jurors who should have been removed for cause constitutes a denial or impairment of the exercise of peremptory challenges; and if so, under what circumstances such impairment violates federal due process.

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[4]Thus, it can be seen that even if the majority of the Supreme Court of Florida is correct in its view that none of the seven jurors should have been excused for cause, that determination is irrelevant to this claim. No matter how Van Poyck used his peremptory challenges, two pro-death jurors sat on his jury, over his objections. This alone violates the Sixth and Fourteenth Amendments.

In Ross, this Court faced a situation in which a state trial court in a capital case had refused to remove for cause a juror who had declared that he would automatically vote to impose the death penalty if the defendant was found guilty. That juror, however, was then removed by the defendant's use of a peremptory challenge. In contrast to the case at bar, in which Van Poyck unsuccessfully challenged for cause two jurors who ultimately sat on Van Poyck's jury, the defendant in Ross did not challenge for cause any of the jurors who actually sat on his jury, nor did he claim that any unfair or partial jurors actually sat on his jury.

Rather, the Ross defendant presented a two-fold claim. First, relying on language from Gray v. Mississippi, 481 U.S. 648 (1987), he argued he was deprived of his Sixth and Fourteenth Amendment right to a fair and impartial jury on the theory that because he was forced to use one of his peremptory challenges to remove a juror who should have been removed for cause by the trial court, "the composition of the jury panel as a whole could possibly have been affected by the trial court's error." The Ross Court rejected that argument, holding instead that the relevant inquiry must focus on the jurors who actually sat on the jury. Because there was no claim that the actual jury was biased or partial, there was no violation of his right to a fair and impartial jury:

> So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.

Id. Significantly, and in keeping with this Court's long line of precedent, the Court reaffirmed that had the objectionable juror actually sat on the jury, a reversal of the death sentence would be warranted. Id. at 85.

In his second claim, the defendant in Ross argued that by refusing to excuse the juror for cause and thereby forcing him to use one of his allotted peremptory challenges to "cure" this error, the trial court's actions arbitrarily deprived him of his full complement of peremptory challenges in violation of the Fourteenth Amendment. In rejecting this claim, the Ross Court made several salient observations. First, the Court reiterated that "[b]ecause perempto-

ry challenges are a creature of statute and are not required by the Constitution, [citations omitted], it is for the state to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise." Ross, 487 U.S. at 82. The Court then held that:

> As such, the "right" to peremptory challenges is "denied or impaired" only if the defendant does not receive that which state law provides.

Id. at 89. The Court observed that under Oklahoma law a defendant who disagrees with the trial court's ruling on a for-cause challenge must, in order to preserve the claim that the ruling deprived him of a fair trial, exercise a peremptory challenge to remove the juror. "Even then the error is grounds for reversal only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him." Id. at 89. This, the Ross Court held, was a reasonable compromise:

> We think there is nothing arbitrary or irrational about such a requirement, which subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of empaneling an impartial jury.

Id. at 90. Important to the case at bar, the Ross Court left for another day a significant question:

> We need not decide the broader question whether in the absence of Oklahoma's limitation on the "right" to exercise peremptory challenges, "a denial or impairment" of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been excused for cause.

Id. at 91, n.4.

This case presents this Court with an opportunity to decide the "broader question" contained in Footnote 4, and find denial or impairment of Van Poyck's exercise of peremptory challenges. Although Florida, like Oklahoma, requires a defendant to use his peremptory challenges to excuse jurors who should have been

excused for cause in order to preserve the issue for appeal, unlike Oklahoma, the objected to jurors who actually sat on the jury *need not* be ones so objectionable that they would have met the test for excusal for cause, but *need only be* jurors who the defendant did not want seated and who he would have excused with a peremptory challenge had he any peremptories left. See, e.g., Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990); Diaz v. State, 608 So. 2d 888, 890 (Fla. Dist. Ct. App. 1992), rev. denied, 613 So. 2d 9 (Fla. 1993). Hence, the facts at hand present a clear "denial or impairment" of Van Poyck's exercise of peremptory challenges.

Moreover, the facts of this case provide an excellent opportunity for the Court to re-examine Ross's gloss on the relationship between denial or impairment of the exercise of peremptory challenges and due process. Unlike the defendant in Ross, who was improperly forced to use just one peremptory, Van Poyck was forced to use seven of ten of his peremptory challenges on jurors who should have been excused for cause. More important, unlike the defendant in Ross, at least two biased jurors actually sat on Van Poyck's jury, *a fact never disputed or addressed by the majority of the Supreme Court of Florida*. See Van Poyck v. Singletary, 715 So. 2d 930, 938 (1998) (Justices Anstead, Kogan and Shaw, dissenting) ("As a result, two pro-death jurors sat on his jury."). Under these circumstances, Van Poyck submits that he did not receive "that which state law provides" when he was arbitrarily deprived of virtually all of his peremptory challenges, to his clear prejudice.[5] As a result, this Court should take the opportunity to ensure that the language in Ross does not encompass a situation in which a defendant is denied virtually all of his peremptory challenges in an improper and arbitrary manner.

Ultimately, the facts of this case are sufficiently different from those in Ross as to distinguish the two, and to warrant a re-exami-

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[5]Further evidence that Van Poyck "did not receive that which state law provides" is the unorthodox "deal" that the trial court attempted to force on Van Poyck, whereby the Court would only give Van Poyck additional peremptory challenges if he would give up his right to voir dire a particular prospective juror; voir dire is a statutory right as well as one compelled by due process. See O'Connell v. State, 480 So. 2d 1284 (Fla. 1985).

nation of Ross's sweeping language which implies that under no circumstances can a "denial or impairment" of a defendant's right to peremptory challenges under state law rise to a due process violation. Moreover, this case falls squarely within the "broader question" left unanswered in Footnote 4 of Ross and should be answered.

ARGUMENT III

DID THE SUPREME COURT OF FLORIDA MISAPPLY THIS COURT'S HOLDINGS IN ROSS V. OKLAHOMA AND MORGAN V. ILLINOIS WHEN IT HELD THAT JURORS WHO ARE UNALTERABLY IN FAVOR OF DEATH AND WHO ARE FIRMLY CONVINCED OF THE PETITIONER'S GUILT, ARE NEVERTHELESS NOT EXCUSABLE FOR CAUSE WHEN THEY SUBSEQUENTLY AFFIRMATIVELY ANSWER SOME GENERAL "FAIRNESS AND FOLLOW THE LAW" QUESTIONS? AND, IF SO, WAS THE PETITIONER DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY WHEN AT LEAST TWO BIASED, PRO-DEATH JURORS ULTIMATELY SAT ON THE JURY?

In Morgan v. Illinois, 504 U.S. 719 (1992), this Court reaffirmed its prior holding in Wainwright v. Witt, 469 U.S. 412 (1985), as to the proper standard of review for determining when a prospective juror can or should be excused for cause due to his views on the death penalty:

> Witt held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " 469 U.S. at 424, 105 S. Ct. at 852 (quoting Adams v. Texas, supra, 448 U.S. at 45, 100 S. Ct. at 2526).

Morgan, supra, at 728.

Morgan was a capital case in which the trial court, during voir dire, had questioned prospective jurors as to whether they held views *against* the death penalty so strong as to prevent them from serving on the jury, pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). However, the trial court denied the defendant's request to have the Court voir dire the prospective jurors as to whether they were so strongly *in favor* of the death penalty that they would automatically vote to impose it no matter what the facts were. The State of Illinois argued before this Court that there was no error because the trial judge had asked most of the veniremen general fairness and "follow the law questions" and most of the jurors had answered affirmatively. All had sworn an oath.

In reversing, the Morgan Court reaffirmed that jurors who would automatically vote for death are unqualified to serve on a capital jury:

> We reiterate this view today. A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. . . . Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the state is disentitled to execute the sentence.

Id. at 728. The Court then held that the general fairness and "follow the law" questions made by the trial court were insufficient to detect those jurors who would automatically impose the death sentence. Of particular relevance to the instant issue is the Court's reasoning in coming to this conclusion. The Morgan Court recognized that some jurors who are unalterably in favor of the death sentence and who would always impose it can nevertheless affirmatively answer general fairness and "follow the law" questions and still

believe that their views do not conflict with their answers:[6]

> As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. More importantly, however, the belief that death should be imposed *ipso facto upon conviction of a capital offense reflects directly on that individual's inability to follow the law* . . . . It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic belief about the death penalty would prevent him or her from doing so.

Id. at 735 (emphasis added). In Footnote 9 on that same page, this Court gave some examples from the voir dire which illustrate this point exactly. Van Poyck submits that those examples describe precisely the situation at bar. During voir dire all nine prospective jurors (the seven Van Poyck was forced to exercise peremptory challenges against after his motions to excuse them for cause were wrongfully denied, plus the two who actually sat on the jury) indicated that they would automatically vote for death, or that they were already convinced of Van Poyck's guilt. An examination of their responses demonstrates that they met the Witt standard for excludability, to wit, that their views would prevent or substantially impair the performance of their duties as jurors.[7] The majority

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[6]The "general fairness" and "follow the law" questions propounded by the trial court in Morgan were: (1) "Would you follow my instructions on the law even though you may not agree?" (2) "Do you know of any reason why you cannot be fair and impartial?" (3) "Do you feel you can give both sides a fair trial?" Morgan, 504 U.S. at 723-724.

[7]The bias and partiality of all nine prospective jurors is highlighted by the fact that their responses on voir dire were virtually identical with prospective jurors Abufaris and Bruschi who, in Van Poyck's 1990 direct appeal, a unanimous Supreme Court had held *should have been excused for cause*. In their 1998 decision, however, when confronted with this comparison, the majority "revisited" the 1990 decision and, in a blatant (and unexplained) violation of the law of the case doctrine, reversed itself, finding that there was nothing in the responses of Abufaris and Bruschi to warrant their excusal for cause. This arbitrary, belated changing of the facts was termed "scary" by the dissenting Justices, and further undermines the majority's conclusions.

of the Supreme Court of Florida held that the seven prospective jurors excused by Van Poyck's peremptory challenges had eventually given responses satisfactory enough to allow them to serve. Van Poyck urges the view expressed by the dissenting Justices, that these responses were simply general ones given to leading questions obviously designed to elicit just such a response:

> This simplistic analysis [by the majority] and conclusion that a juror becomes immune to challenge as long as a juror will answer the right leading question is directly contrary to our established law [citations omitted]. These cases make clear that there is no particular question that can be asked nor answer received that will serve as a magic wand to qualify an otherwise objectionable juror.

Van Poyck v. Singletary, 715 So. 2d 930, 935 (1998) (Justices Anstead, Kogan and Shaw, dissenting). The idea that such general "fairness and follow the law" responses can serve to qualify prospective jurors who have already demonstrated that they meet the Witt standard for exclusion is contrary to the spirit of Morgan, supra, and should not be countenanced, lest the Court's holdings in Witt, Morgan, and progeny be rendered meaningless. As this Court aptly held in Turner v. Murray, 476 U.S. 28, 35-36 (1986):

> We have struck down capital sentences when we found that the circumstances under which they were imposed "created an unacceptable risk that 'the death [may have been] meted out arbitrarily or capriciously' or through 'whim . . . or mistake'." Caldwell, supra, at 343, 105 S. Ct. at 2647.

The instant case presents this Court with an opportunity to correct a death sentence handed down in violation of this Court's controlling precedent, and an opportunity to provide guidance to lower courts on this issue of grave importance.

CONCLUSION

WHEREFORE, having demonstrated that the Supreme Court of Florida has misconstrued and misapplied several of this Court's controlling cases, and that Van Poyck's death sentence is in violation of the Sixth and Fourteenth Amendments to the United

States Constitution, Petitioner respectfully prays that this Court will accept jurisdiction over this matter and review the decision below.

Respectfully submitted,

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APPENDIX

Van Poyck v. Singletary, 715 So. 2d 930 (Fla. 1998) A2-A27

Order Denying Petitioner's Motion for Rehearing and/or Clarification B1

APPENDIX A

SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,
Petitioner,

vs.

HARRY K. SINGLETARY, JR., ETC.,
Respondent.

No. 89,870

[May 14, 1998]

PER CURIAM.

William Van Poyck, a prisoner under sentence of death, petitions this Court for a writ of habeas corpus. We have jurisdiction pursuant to article V, section 3(b)(9), Florida Constitution, and find that Van Poyck is not entitled to relief.

On June 24, 1987, Van Poyck was arrested following an attempt to free prison inmate James O'Brien from the custody of two corrections officers. Officer Fred Griffis was shot and killed during the commission of the crime. Van Poyck was found guilty of first-degree murder, attempted first-degree murder, six counts of attempted manslaughter, armed robbery with a firearm, aggravated assault, and aiding in an attempted escape. The jury recommended death by a vote of eleven to one and the trial judge sentenced Van Poyck to death. The facts of the case are set forth in greater detail in Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990), cert. denied, 499 U.S. 932 (1991), in which this Court affirmed the convictions and death sentence. Van Poyck subsequently filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. The trial court denied relief after a substantial evidentiary hearing. This Court recently affirmed the trial court's ruling on the

rule 3.850 motion in Van Poyck v. State, 694 So. 2d 686 (Fla. 1997). Van Poyck now files this petition for a writ of habeas corpus claiming that: (1) his appellate counsel was ineffective for failing to properly raise the issue of the trial court's wrongfully forcing him to exhaust his peremptory challenges; (2) his death sentence is unconstitutional because the judge and jury weighed the invalid aggravators that the murder was premeditated or that Van Poyck was the shooter; and (3) he was charged with and convicted of criminal offenses that did not exist as a matter of law. Issues one and three warrant discussion. Issue two is procedurally barred.[1]

As to his first issue, Van Poyck claims the trial judge wrongfully forced him to exhaust his peremptory challenges on seven venirepersons who should have been dismissed for cause, then erroneously denied his request for an additional peremptory challenge.[2] Van Poyck asserts that as a result of the trial judge's error, two challenged jurors served on the jury.[3] Van Poyck contends that his appellate counsel on direct appeal compounded the error by failing to properly present the issue because he identified the wrong jurors seated on the jury, and then failed to argue the issue in any depth or cite relevant legal authority. Van Poyck states that this Court appropriately rejected the argument because the jurors iden-

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[1]This claim was raised and rejected on direct appeal, Van Poyck, 564 So. 2d at 1070-71, and also rejected as procedurally barred on the rule 3.850 appeal. Van Poyck, 694 So. 2d at 698.

[2]The trial judge offered to grant defense counsel's request for an additional peremptory challenge on the condition that Van Poyck waive his right to examine a venireman that the judge wanted to excuse for cause. Apparently, the judge wanted this juror excused because he was concerned about the juror's competency. The trial judge admitted "that the Appellate Court won't like [the proposed bargain]." Defense counsel refused the offer and the trial judge denied his request for an additional peremptory challenge. We do not condone the trial judge's proposed "bargain." Counsel for both the prosecution and the defense have a due process right and a right under Florida Rule of Criminal Procedure 3.300(b) to examine venirepersons. O'Connell v. State, 480 So. 2d 1284 (Fla. 1985).

[3]The issue was not preserved for direct appeal as to one of these jurors because Van Poyck's trial counsel did not identify her as a venireperson whom he wanted to excuse through an additional peremptory challenge. Kearse v. State, 662 So. 2d 677, 683 (Fla. 1995). Thus, Van Poyck's appellate counsel was not ineffective for failing to raise this procedurally barred claim.

tified by his appellate counsel, although unsuccessfully challenged for cause, were subsequently dismissed for personal reasons, and thus it was unnecessary for Van Poyck to exercise peremptory challenges. Van Poyck claims that his appellate counsel's deficient performance was prejudicial because this Court would have granted a new trial had the issue been properly presented. We do not agree that the trial court wrongfully forced Van Poyck to exhaust his peremptory challenges or that Van Poyck's appellate counsel rendered ineffective assistance.

If a reasonable doubt exists as to whether a juror can possess an impartial state of mind in the discharge of his or her duties, that juror is incompetent to serve and must be excused for cause. Hill v. State, 477 So. 2d 553, 556 (Fla. 1985). A trial judge has great discretion in ruling on challenges for cause based on juror incompetency, Gore v. State, 22 Fla. Law Weekly S471, S472 (Fla. July 17, 1997), and we will not overturn the trial judge's determination in the absence of "manifest error." Smith v. State, 699 So. 2d 629, 636 (Fla. 1997). The denial of a challenge for cause will be upheld if there is competent record support for the decision. Gore, 22 Fla. L. Weekly at S472; Johnson v. State, 660 So. 2d 637, 644 (Fla. 1995). On the other hand, it is reversible error when a challenge for cause is improperly denied, and the defendant then exhausts his peremptory challenges on venirepersons who should have been dismissed for cause and a request for additional peremptory challenges is denied. Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990); Moore v. State, 525 So. 2d 870, 873 (Fla. 1988); Hill v. State, 477 So. 2d 553, 556 (Fla. 1985).

Based on our examination of the record, we find that the trial judge was clearly within his discretionary authority in denying the challenges for cause to the seven venirepersons now claimed by Van Poyck to have been biased or prejudiced. During individual

voir dire, each of the seven persons repeatedly and unequivocally stated that he or she could render a verdict based solely on the evidence and the instructions given by the trial judge.[4] We find

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[4]The following are excerpts from voir dire of the seven venirepersons:

> Q [The Court]: Would you say . . . that you could sit on a jury and if a person is found guilty of first degree murder, listen to the evidence in the penalty phase, listen to the instructions in the law and make a recommendation to me and follow the instructions and the law, make a recommendation about either life in prison or death or do you think you would always recommend death?
>
> A [Juror A]: I don't think I would always recommend death. It would depend on the facts and the law.
>
> . . . .
>
> Q: [W]ould [you] be willing and able to recommend life if the law [sic] met the requirements of the law?
>
> A: Yes, sir.
>
> . . . .
>
> Q [The State]: And it would not be fair to the Defendant if a jury were to automatically recommend death in every case?
>
> A: I agree.
>
> Q: So, even in a case where there is an intentional killing of a prison guard, could you still look at all the surrounding facts and circumstances such as this person's involvement, any aggravating factors, any mitigating factors that you are instructed to by the Court before making that recommendation?
>
> A: I would be willing to listen to all the factors.
>
> . . . .
>
> Q: Would you make up your decision of guilt or innocence based upon the evidence that you hear in the courtroom where you get an opportunity to see the witnesses, hear what they have to say, hear the cross examination, see if the evidence conflicts or is consistent with the other evidence in the case?

A: I would have to do that.

Q: That's where a person's guilt or innocence should be based upon, the actual witnesses with confrontation and cross examination, you agree with that?

A: Yes.

Q: That's what you would do in this case?

A: Yes.

. . . .

Q [The Court]: If I instructed you that under the laws or our country, that under the constitution Mr. Van Poyck as he sits here right at this moment is presumed innocent and that presumption stays with him until the time the State presents evidence sufficient for you to find him guilty beyond a reasonable doubt, would you be able to follow that instruction?

A: I would hope that I could.

Q: Okay. If I told you right now the ball is in your court, is Mr. Van Poyck guilty or not guilty, what would you say in light of what I just told you?

A: I would have to say not guilty.

. . . .

Q [The Court]: Under the law of Florida the death penalty is an appropriate sentence only in very special cases. And I am going to instruct you on the law as to, basically, what those aggravating circumstances and what mitigating circumstances are. Would you follow those instructions?

A [Juror B]: (Nods in the affirmative.)

Q: And disregard your personal opinion on the matter?

A: (Nods in the affirmative.)

. . . .

Q: Would you follow my instructions and agree that not in all cases a person should get a death penalty?

A: I will follow your instructions.

Q: No matter what they are?

A: No matter what they are.

. . . .

Q: [Van Poyck] has no burden of proof under the law. He is not required to prove anything in a criminal case, only the State is required to prove anything; okay?

A: (Nods in the affirmative.)

Q: You understand that?

A: (Nods in the affirmative.)

Q: Do you agree with that one principle of law?

A: Yes.

. . . .

Q [The Court]: Under the law of Florida, sir, the death penalty is a penalty that is appropriate only in very specific and limited cases. And you will be instructed in the law as to what to consider in regards to the aggravating and mitigating circumstances. You must follow the law. Do you understand that?

A [Juror C]: Yes.

Q: Could you follow that law irregardless of your personal feelings?

A: Yes.

Q: Could you perceive a case where an individual would be on a jury and you would hear the aggravating, mitigating circumstances and you would vote a recommendation of life in prison?

A: Yes.

. . . .

Q: All right, would you agree, sir, that the matter, matter of

employment of the alleged dead person being a . . . law enforcement officer. . . would not affect your ability to render a fair recommendation as to life or death?

A: It would not.

. . . .

Q: Sir, would you say even though you feel [death] is the appropriate penalty [in cases of premeditated first-degree murder] . . . does that mean that it is a penalty that you would vote for in every first degree murder case regardless, you would not pay attention to the evidence or the instructions or would you follow them?

A: I would listen and think about it and weigh all the evidence and make my decision on that. I would not go in straight looking at: Well, it's premeditated.

Q: It's not a closed issue then, to you?

A: Right. I am not—I would have to have an open mind about it.

Q: You will follow my instructions that I tell you?

A: Yes, sir.

. . . .

Q [The Court]: Could you, sir, sit on the jury, listen to the instructions of the law and the evidence and render a verdict based on the instructions on the law and the evidence and disregard your personal feelings?

A [Juror F]: I, gee, I would have to.

Q: Okay. In other words, if you sat on the jury you could conceive where you would sit on the jury, listen to the evidence and the instructions on the law and come back and say based on everything I have heard there should be a recommendation of life. You could do that?

A: I can do that.

. . . .

Q: The death penalty should not be imposed in all cases; is

that a fair statement?

A: Yes.

. . . .

Q [The State]: Sir, even though it's a police officer that was, or a prison guard that was killed in this case, would you listen to the mitigating factors?

A: I would listen to the mitigating factors.

Q: [W]ould you listen to the instructions of the Court?

A: Yes.

Q: Would you weigh any mitigating factors against the legal aggravating factors the Court would instruct you?

A: That would be my job.

Q: Concerning that [pretrial] publicity, even though you have read the papers, you formed an opinion from that, could you set that aside and reach a decision based upon the law and the evidence?

A: I feel that I would, yes. I am intelligent enough to go on what is said, what is done in the courtroom.

. . . .

Q [The Court]: Could you perceive of a situation, excuse me, where you could be on a jury and hear the aggravating and mitigating circumstances and the instructions on the law and you could return a recommendation of, personally, of life in prison?

A [Juror M.]: Yes, if it was explained or, you know, like I said, it was the law.

Q: Okay, what you're telling me then, what I believe is you would be willing to listen to the evidence and aggravating actors, evidence of mitigating factors, you would follow the law that I give you or instructions, make your recommendation based on those factors?

A: Yes.

Q: You would follow that law whether you personally agreed with it or not?

A: Yes.

. . . .

Q [The State]: If there are aggravating factors that exist outweighing the mitigating factors, then you should make a recommendation of life. Could you follow those instructions of the Court and be fair to both sides?

A: Yes.

Q: So, you would not automatically just because a person is convicted of first degree murder, you would not automatically recommend death. You would look at the circumstances and the Defendant's background or what have you and look at all the circumstances?

A: The facts and the circumstances.

Q: Listen to the judge and make a reasoned decision?

A: Yes.

. . . .

Q [The Defense]: Suppose the judge should instruct you premeditated murder, even though it's no question but that the person did it, that it is not the end. There are other things that need to be considered. Would you have a problem putting aside your feelings about the death penalty and about those people, you know, living off the public coffers, for the rest of their lives, would you have a problem putting that stuff aside and considering the other things that would need to be considered?

A: No, because the judge, if he says that's the law or that's the way it should be, then, you know, that's his decision, you know. I can live with it.

Q: Would you have any problems going home and telling your family members or your friends that you returned a life recommendation in a premeditated murder case?

A: No.

. . . .

Q [The Court]: [C]ould you personally sit on a jury where a person was convicted of first degree murder, hearing the aggravating and mitigating circumstances and instructions on the law and follow those instructions on the law whether you personally agree with them or not?

A [Juror M.]: Yes, I believe I could.

. . . .

Q: Could you vote a recommendation of life if the law warranted that, whether you personally agreed or not?

A: Yes, I would, sir.

. . . .

Q: Ma'am, let me ask you one question. If you were on a jury and you went to the penalty phase and I gave you an instruction in the law as to what concerns the penalty phase and your recommendation, would you follow that instruction in the law?

A: Yes

Q: Whether you personally agree with it or not?

A: Yes, I would follow the instructions of the law.

Q: Say it involved a police officer or a prison guard and you have those strong feelings about them that you mentioned. Would you still follow those instructions in the law?

A: If I took the oath and all that, yes, I would follow the instructions. I would put my own emotions aside, try not to make up my mind until after I have heard the instructions. But I would follow the instructions. That's the way it would be. That's the way it would have to be because I believe in the law.

. . . .

Q [The Court]: Will you be willing, sir, to look at [the case] from an objective viewpoint? You understand that under our law the death penalty is only a sentence imposed

in specific cases? Would you be willing to follow our law when it was given to you in regards to that extent?

A [Juror N.]: Yes.

Q: And you have specific instructions on the law as to when you make a recommendation as to death or life. Would you be willing to follow those?

A: Yes.

. . . .

Q [The State]: Could you make a decision if you're chosen as a member of this panel based upon what the judge tells you, do you think you could give that Defendant a fair trial?

A: Yes, I would have to follow the law, yes.

nothing in this record that mandates that any of these venirepersons should have been excused for cause.

Van Poyck notes that this Court decided in his direct appeal that the two jurors incorrectly named by his appellate counsel had a pro-death bias and should have been struck for cause. Van Poyck, 564 So. 2d at 1071. He claims that because the voir dire testimonies of these jurors are indistinguishable in content from the voir dire of various venirepersons whom his appellate counsel should have named, this Court would have found reversible error in the denial of the for-cause challenges and in the denial of his request for an additional peremptory challenge had he received effective assistance of counsel on appeal. We have reexamined the voir dire of the jurors who were challenged for cause and were the subject of a claim in the initial appeal. In their voir dire, they each unequivocally indicated that they would abide by the trial court's instructions and would recommend a life sentence if the mitigating circumstances outweighed the aggravating circumstances.[5] Since

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[5]The following are excerpts from the voir dire of these venirepersons:

> Q [The Court]: Will you follow my instructions on the law if they were to tell you that the death penalty is limited and a recommendation only of death can only be given in specific instances where certain aggravating factors outweigh any mitigating circumstances?
>
> A [Juror AA]: Uh-huh.
>
> . . . .
>
> Q: Would you say that it's not fair for a jury to always recommend the death penalty, would you agree with that, a jury should not always recommend death?
>
> A: Yes, I think I do.
>
> . . . .
>
> Q [Defense Counsel]: [D]o you still feel, however, that whatever instructions there are that in all cases where there is an intentional killing you believe that the death penalty should be given?

A: No, not all cases.

. . . .

Q [The Court]: [U]nder our system of justice Mr. Van Poyck, as he is seated here, is presumed innocent... Do you agree with that?

A [Juror DB]: Yes, I do.

. . . .

Q: Would you agree that you could sit as a juror in a case of this nature of first degree murder and if you listened to the aggravating and mitigating circumstances that you would follow my instructions on the law disregarding your personal feelings?

A: Yes, I would.

they were excused for personal reasons and Van Poyck did not have to exercise a peremptory challenge, the grounds for their excusal for cause was a non-issue in the initial appeal. On a reexamination of the record, we also find that the trial judge properly exercised his discretion in denying the challenge for cause to each of these jurors.

In conclusion, we find that Van Poyck's appellate counsel did not render ineffective assistance for failing to pursue and argue Van Poyck's claim that the other seven venirepersons were biased or prejudiced. See Williamson v. Dugger, 651 So. 2d 84, 86 (Fla. 1994); Chandler v. Duggar, 634 So. 2d 1066, 1068 (Fla. 1993).

In his third issue, Van Poyck claims that he was charged with and convicted of crimes that do not exist as a matter of law. Specifically, Van Poyck contends that his convictions for attempted first-degree murder and attempted manslaughter were based on a felony murder theory, and that attempted felony murder was determined in State v. Gray, 654 So. 2d 552 (Fla. 1995), to be a legal impossibility. This claim is also without merit. In State v. Woodley, 695 So. 2d 297 (Fla. 1997), this Court clarified that the Gray decision should not be applied retroactively to overturn a conviction of attempted felony murder that has become final on appeal. Because the crime of attempted felony murder was a valid offense when Van Poyck's convictions became final, he is not entitled to the relief requested.

Accordingly, the petition for a writ of habeas corpus is denied.

It is so ordered.

OVERTON, HARDING and WELLS, JJ., and GRIMES, Senior Justice, concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which KOGAN, C.J. and SHAW, J., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

ANSTEAD, J., concurring in part and dissenting in part.

The majority's holding on the juror challenge issue is not only

contrary to this Court's prior unanimous opinion in this case, but is also erroneously based solely on the faulty premise that "each of the seven persons [challenged for cause] repeatedly and unequivocally stated that he or she could render a verdict based solely on the evidence and the instruction given by the trial judge." Majority op. at 2. This simplistic analysis and conclusion that a juror becomes immune to challenge as long as a juror will answer the right leading question is directly contrary to our established law. See Bryant v. State, 656 So. 2d 426, 428 (Fla. 1995); Hill v. State, 477 So. 2d 553, 555 (Fla. 1985); Singer v. State, 109 So. 2d 7 (Fla. 1959). These cases make clear that there is no particular question that can be asked nor answer received that will serve as a magic wand to qualify an otherwise objectionable juror.

The majority cites Hill but fails to apply its essential holding that where "any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause." Hill, 477 So. 2d at 556. A recent opinion by Judge Pariente for the Fourth District Court of Appeal relying on our established law demonstrates the flaw in the majority's analysis and conclusion. Writing in Williams v. State, 638 So. 2d 976 (Fla. 4th DCA 1994), Judge Pariente correctly analyzed this same issue:

> A juror's subsequent statement that he or she could be fair should not necessarily control the decision to excuse a juror for cause, when the juror has expressed genuine reservations about his or her preconceived opinions or attitudes. Reasonable doubt has been found where a juror admitted she "probably" would be prejudiced, even though she then asserted she "probably" could follow the judge's instructions.
>
> It was only after the court asked a series of questions, which included leading questions, that this juror asserted his belief that he hoped he could be fair and impartial. A "juror who is being asked leading questions [by the court] is more likely to 'please' the judge and give the rather obvious

> answers indicated by the leading questions . . . ." Thus, the juror's responses to questioning by the court must be evaluated in light of this reality.

Id. at 979 (alteration in original) (citations omitted) (quoting Price v. State, 538 So. 2d 486, 489 (Fla. 3d DCA 1989)). In Hill, we emphasized, in much the same way Judge Pariente did in Williams, that "the 'statement of a juror that he can readily render a verdict according to the evidence, notwithstanding an opinion entertained, will not alone render him competent if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence.'" 477 So. 2d at 555-56 (quoting our seminal opinion Singer v. State, 109 So. 2d at 22).

Trial and appellate courts must be diligent in distinguishing between those responses merely reflecting some understandable confusion with the intricacies of the criminal law, and those responses which equivocally cast doubt as to that juror's ability to render an impartial and unbiased decision or recommendation as to the appropriate sentence in a particular case. Thus, "[i]n evaluating a juror's qualifications, the trial judge should evaluate all of the questions and answers posed to or received from the juror." Parker v. State, 641 So. 2d 369, 373 (Fla. 1994). Thereafter, where "'any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation as to punishment, the juror must be excused for cause.'" Bryant, 656 So. 2d at 428 (quoting Hill, 477 So. 2d at 556); see also Singer; Williams, 638 So. 2d at 978 ("Because impartiality of the finders of fact is an absolute prerequisite to our system of justice, we have adhered to the proposition that close cases involving challenges to the impartiality of potential jurors should be resolved in favor of excusing the juror rather than leaving doubt as to impartiality.").

Under this well-established standard of "reasonable doubt," the relevant inquiry is not whether the juror simply agrees to follow the law as instructed by the court, but whether the juror has demonstrated by her responses to all inquiries that she has an open mind on the issues being tried and can ultimately consider the evidence presented and render an unbiased decision. See Lusk; see also

Ferrell v. State, 697 So. 2d 198, 198 (Fla. 2d DCA 1997) (reversing defendant's conviction where juror should have been excused because his reluctance to consider voluntary intoxication defense raised reasonable doubt as to ability to render impartial verdict). An examination of the record here demonstrates that several death penalty qualified jurors should have been excused for cause.

CHALLENGES ON APPEAL

For example, here, venire persons Busto, Carter, Farmer, and Moker initially indicated strong support for the death penalty or expressed a predisposed belief that premeditated murder or the murder of a law enforcement officer automatically warranted the death penalty. Upon further questioning by the court or the attorneys, however, each clearly stated that their recommendation would depend on the actual circumstances presented in the case, and they would not automatically vote in favor of the death penalty. I find that the trial court and prosecutors sufficiently rehabilitated those jurors through additional questioning and further explanation of the jury's role in criminal proceedings. Therefore, I agree with the majority that there was no error in their selection.

ALDRIDGE, NICKERSON AND MILLER

In contrast, however, and left unexplained by the majority, venire persons Aldridge, Nickerson and Miller each indicated biases or prejudices as to Van Poyck's guilt or a predisposition in favor of the death penalty for him, which clearly cast reasonable doubt on their impartiality. For example, Miller responded during the selection process:

> THE COURT: . . . If you were asked your opinion of the death penalty, sir, would you say you are strongly in favor, strongly opposed or in the middle?
>
> MR. MILLER: I am for capital punishment.
>
> THE COURT: Okay, would you agree, sir, that it is a fair statement that capital punishment or the death penalty is not an appropriate sentence in all

first degree murder cases, that it depends on the case?

MR. MILLER: Right. The thing, if a person is without a doubt proven guilty, you know, for a rape or murder, I believe, you know, death ought to be the sentence.

THE COURT: In every case no matter what?

MR. MILLER: Without a doubt, yes, if it's proved without a doubt.

After additional questions by the prosecutor and defense counsel, the following colloquy occurred:

MR. KLEIN [Defense Counsel]: Is there any particular type of case where you would have severe problems or substantial problems with giving a life recommendation? How about premeditated murder, would you have a problem giving a life recommendation for premeditated murder assuming, again, the facts show there is no question that he did it beyond a reasonable doubt?

MR MILLER: Yes, premeditated I would say it was deliberate so long as it was without a doubt, I would probably, you know, go with the death penalty.

MR. KLEIN: Would you feel the same way if you were to know that the alternative to the death penalty that a person should spend the rest of his life in prison, you as a taxpayer would have to house and feed him for the rest of his natural life, would you, would you hesitate to give a life recommendation under those circumstances?

MR. MILLER: Yes

He further stated that he did not believe the public should be burdened with the cost of feeding and housing persons convicted of premeditated murder. Although the majority notes Mr. Miller's later statements in response to leading questions that he could set his personal feelings aside and follow the court's instructions, his initial statements strongly cast doubt on his ability to remain impartial and, under our established case law, it was error for the trial court to deny a challenge for cause.

Similarly, Aldridge's statements indicated reasonable doubt as to his ability to accept Van Poyck as innocent until proven guilty:

> MR. KLEIN: Mr. Aldridge, as a result of what you have read [in the newspapers], have you formed any opinion, at all, about this case or about Mr. Van Poyck?
>
> ALDRIDGE: Based on the facts presented in the newspaper, my opinion is that the Defendant is guilty.
>
> MR. KLEIN: Okay. Based upon what you read, would you, have, would you, before you could bring back a verdict of not guilty, would you ask for evidence, would you ask for us as Defense to present evidence to persuade you otherwise?
>
> MR. ALDRIDGE: Yes, certainly.
>
> MR. KLEIN: Would you have a difficult time finding Mr. Van Poyck not guilty unless you heard some evidence from the Defense to convince you that he was innocent in view of what you have heard?
>
> MR. ALDRIDGE: Yes, in view of what I have read, yes.
>
> THE COURT: Mr. Aldridge, let me ask you something. If I instructed you that under the law of our country, that under the constitution Mr. Van Poyck as he sits here right at this moment is presumed

innocent and that presumption stays with him until the time the State presents evidence sufficient for you to find him guilty beyond a reasonable doubt, would you be able to follow that instruction?

MR. ALDRIDGE: I would hope that I could.

THE COURT: If I told you right now the ball is in your court, is Mr. Van Poyck guilty or not guilty, what would you say in light of what I just told you?

MR. ALDRIDGE: I would have to say not guilty.

THE COURT: Okay. Would you be able to follow that if you were a juror and not form an opinion or fixed in your mind a verdict until you have heard all the evidence in the courtroom?

MR. ALDRIDGE: I would hope that I could.

THE COURT: Also, under our system the Defendant in any criminal case is not required to testify nor present evidence. The reason for that is that the burden of proof in a criminal case is on the State, not on the Defense. Would you agree with that?

MR. ALDRIDGE: Yes.

THE COURT: Would you be able to do that even if you read the papers?

MR. ALDRIDGE: I would hope that I could.

(Emphasis added.) Aldridge's statements that he hoped he could set aside his personal views and render a verdict based solely on evidence presented in the courtroom did not overcome his earlier statement that he believed Van Poyck was guilty. Rather, his responses, "I hope that I could" to each of the court's questions pertaining to the guilt phase of the trial further clouded Aldridge's ability to set aside his personal biases. Williams; Singer.

Nickerson also declared strong support for the death penalty and expressed a predisposed belief that premeditated murder warrants the death penalty. Upon being advised by the court that, if selected as a juror, he would be given a set of instructions to follow in making a recommendation as to sentence, Nickerson claimed that he "probably would" follow the instructions regardless of his personal views, but "d[id] not know for sure."

When compared to the juror responses discussed in our prior cases and those discussed by Judge Pariente in Williams, it is clear that Nickerson, Miller and Aldridge should have been excused for cause because their responses raised reasonable doubts as to their ability to render an unbiased and impartial decision and recommendation. Despite their affirmations to the court, Nickerson's response that he "probably would" follow the law and Aldridge's statement that he "hoped [he] could" are, for example, far too uncertain and ambiguous to overcome their earlier statements indicating predisposed prejudices. Our case law supports appellant's challenges to these jurors. Because the trial court denied Van Poyck's challenges for cause, Van Poyck was forced to exhaust his peremptory strikes on them. As a result, two pro-death jurors actually sat on his jury.

PRIOR APPEAL

Van Poyck contends that the trial court's error was compounded on direct appeal when his appellate attorney raised the juror qualification issue but identified the wrong two jurors, Bruschi and Abufaris, as objectionable. Appellate counsel's performance was patently incompetent, since Bruschi and Abufaris had both been excused from jury service for other reasons, thereby rendering any trial court error on challenges to them entirely moot. Nonetheless, based upon our established case law discussed above, this Court unanimously held in Van Poyck's first appeal that had jurors Bruschi and Abufaris not been released from jury service for other, personal reasons, the trial court would clearly have been in error in failing to excuse them for cause based on their responses to questions during the jury selection process. Van Poyck v. State, 564 So. 2d 1066, 1071 (Fla. 1990).

Understandably, the appellant compared the responses of Bruschi and Abufaris to the responses of the other jurors he challenged for cause, now having the benefit of this Court's opinion as to the kind of responses that would disqualify a juror. Today, however, the majority opinion pulls the rug out from under the appellant by abruptly receding from our prior unanimous conclusion as to jurors Bruschi and Abufaris. Majority op. at 6. And, of course, this abrupt about-face is done with absolutely no analysis other than the fact that today's majority disagrees with our prior unanimous opinion. Kind of scary, isn't it?

Contrary to the present majority's posture, an examination of the record demonstrates that our prior opinion was correct in concluding that both Abufaris and Bruschi indicated predisposed beliefs that premeditated murder automatically warrants the death penalty, which tainted those jurors' later affirmations to the court that they would follow the law. For example, Bruschi made the following statements during voir dire:

> THE COURT: . . . Would you agree that you could sit as a juror in a case of this nature of first degree murder and if you listened to the aggravating and mitigating circumstances that you would follow my instruction on the law disregarding your personal feelings?
>
> MR. BRUSCHI: Yes, I would.
>
> THE COURT: Would you agree that first degree murder is not the appropriate penalty —that death is not the appropriate penalty in all first degree murder cases?
>
> MR. BRUSCHI: Agree that it is.
>
> THE COURT: You think it is for all cases?
>
> MR. BRUSCHI: For all, for murder.
>
> THE COURT: Okay, what if I told you under Florida law it is not an appropriate penalty for all cases of first degree murder, only in certain cases?

MR. BRUSCHI: It's hard because technically what I believe in, murder is basically punishable by death.

THE COURT: Okay. Would you agree, though, that you would put that feeling aside and render a recommendation of a sentence in this case based on the instructions in the law I give you?

MR. BRUSCHI: Yes, it would.

Upon additional questioning by defense counsel, however, Mr. Bruschi indicated that premeditated murder warrants the death penalty:

MR. KLEIN: Let's go back to premeditated murder if I could. Do you think somebody who committed premeditated murder doesn't deserve to live?

MR. BRUSCHI: Yes, I do. I would agree with that.

MR. KLEIN: How strongly do you feel about that, by the way?

MR. BRUSCHI: I believe, you know, if he committed premeditated murder, thought out and committed murder, he should die for it.

MR. KLEIN: You would not want the State, for instance, spending money to house and feed this guy the rest of his life?

MR. BRUSCHI: No, I don't think so.

MR. KLEIN: This is not something you just felt about recently?

MR. BRUSCHI: I always felt that way.

MR. KLEIN: You feel that way pretty strongly?

MR. BRUSCHI: Yes, I do.

> MR. KLEIN: Do you feel strongly enough about it so you think it would color your judgment, whatever your judgment would be sometime down the road when you were to consider the issue of life or death in a premeditated murder case?
>
> MR. BRUSCHI: It possibly could.

Although Mr. Bruschi told the prosecutor he believed he could set his personal views aside in rendering a recommendation, he later agreed with defense counsel that he was not "one hundred percent sure." Moreover, Mr. Bruschi openly expressed his doubts or reservations about his ability to render an impartial verdict based on his belief that certain murders deserve the death penalty. Thus, Mr. Bruschi's response to the court that he would follow the law does not overcome his attitude regarding the death penalty or his admitted belief that his views "possibly could" taint his ability to render an unbiased recommendation. Williams; Hill.

Likewise, Abufaris indicated that the death penalty is automatically warranted where a person is convicted of premeditated murder indicating a reasonable doubt as to her ability to render an unbiased recommendation. When asked by the prosecutor if she would follow the court's instruction, she responded, "Yes. I think I would." Furthermore, when asked if she could recommend a life sentence if the court's instructions led her to so conclude, Mrs. Abufaris indicated she "probably" would recommend a life sentence "in certain cases." In contrast, when asked whether the death penalty is the appropriate sentence where premeditated, intentional murder is proven, Mrs. Abufaris stated: "Yes, I think I would." Despite Mrs. Abufaris's agreement to follow the law and recommend a life sentence where appropriate, her responses ("I think" and "probably") were sufficiently unequivocal and arguably more in line with pleasing the party asking the questions by providing the obvious, sought after responses. See Williams. Accordingly, it is apparent that this Court did not err in its assessment in Van Poyck's direct appeal that Abufaris and Bruschi's responses were sufficiently equivocal to cast doubt on their ability to set aside any per-

sonal biases and render a recommendation based solely on the evidence presented and the law as instructed by the court.6

In addition, and perhaps most unsettling of all, the majority opinion, in casually casting aside our prior holding, disregards the important and stabilizing legal doctrine of the law of the case without so much as a hint of explanation or justification. "Under this doctrine, all points of law which have been previously adjudicated by a majority of this Court may be reconsidered only where a subsequent hearing or trial develops material changes in the evidence, or where exceptional circumstances exist whereby reliance upon the previous decision would result in manifest injustice." Henry v. State, 649 So. 2d 1361, 1364 (Fla. 1994), cert. denied, 516 U.S. 830 (1995); Preston v. State, 444 So. 2d 939, 942 (Fla. 1984); see also U.S. Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1063 (Fla. 1983) (holding that doctrine of law of the case is limited to rulings on questions of law actually presented and considered on former appeal); Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965) (noting that "an exception to the general rule binding the parties to 'the law

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6I disagree with Van Poyck's assertion that the responses of the two jurors (Moody and Bradford) who sat for the jury are virtually indistinguishable from the responses of Abufaris and Bruschi, and therefore, this Court should hold it was error not to excuse Moody and Bradford for cause. Initially, I note my accordance with the majority opinion that only juror Moody was identified to the trial court during Van Poyck's request for an additional peremptory strike and thus properly preserved for appellate review. See Majority op. at 2 n.3. Juror Bradford was not identified to the trial court during Van Poyck's request for additional peremptory strikes, and therefore any error with regard to that juror has not been preserved for appellate review.

During voir dire, juror Moody asserted that she supports the death penalty; "If they are guilty, I am for." However, she later stated that she would make her decision based on the law as instructed and not on any personal opinions or beliefs. Moreover, she acknowledged that she would not automatically vote for the death penalty in every case in which a person is convicted of first-degree murder nor in every case in which a person is convicted of premeditated murder. Therefore, I would hold that the court did not err in denying Van Poyck's challenge for cause, as well as his request for an additional peremptory strike as to this juror.

of the case' at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons—and always, of course, only where 'manifest injustice' will result from a strict and rigid adherence to the rule"). One such exceptional circumstance is an intervening decision by a higher court contrary to the decision in the former appeal. Brunner Enterprises, Inc. v. Department of Revenue, 452 So. 2d 550, 553 (Fla. 1984). However, "the exception to the rule should never be allowed when it would amount to nothing more than a second appeal on a question determined on the first appeal." Strazzulla, 177 So. 2d at 4 (discussing exceptions to "law of case" doctrine).

The "bottom line" in this case is that when our established case law is properly applied to the juror qualification issues raised here, it demonstrates that a number of challenges for cause were erroneously denied and the defendant, now a convicted and death sentenced defendant, was substantially prejudiced thereby.

KOGAN, C.J. and SHAW, J., concur.

Original Proceeding - Habeas Corpus

Gerald S. Bettman, Jacksonville, Florida, and Jeffrey O. Davis and Mitchell S. Moser of Quarles & Brady, Milwaukee, Wisconsin,

for Petitioner

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for Respondent

APPENDIX B

SUPREME COURT OF FLORIDA

Friday, August 7, 1998

WILLIAM VAN POYCK,
Petitioner,

v. Case No. 89,870

HARRY K. SINGLETARY, JR., etc.,
Respondent.

Petitioner's Motion for Rehearing and/or Clarification is hereby denied.

HARDING, C.J., and OVERTON, SHAW and WELLS, JJ., concur. KOGAN and ANSTEAD, JJ., dissent

A True Copy TC

TEST:

cc: Mr. Gerald S. Bettman
Mr. Jeffrey O. Davis
Mr. Mitchell S. Moser
Ms. Celia A. Terenzio

Sid S. White
Clerk, Supreme Court

Supreme Court, U.S.
FILED
FEB 17 1999
CLERK

Case No. 98-1147

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1998

WILLIAM VAN POYCK, *Petitioner*

vs.

STATE OF FLORIDA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER PETITIONER HAS PROPERLY EXHAUSTED THIS CLAIM IN STATE COURT BELOW. (Petitioner's Question I restated).

II. WHETHER THIS COURT SHOULD REVIEW A STATE COLLATERAL PROCEEEDING WHERE PETITIONER DOES NOT FAIRLY PRESENT ANY FEDERAL QUESTION SINCE THE JURORS COMPLAINED ABOUT WERE NOT CONSTITUTIONALLY OBJECTIONABLE (Petitioner's questions II and III restated).

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Case No. 98-1147
IN THE SUPREME COURT OF THE UNITED STATES
October Term 1998

WILLIAM VAN POYCK, *Petitioner*

vs.

STATE OF FLORIDA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion below has been reported as Van Poyck v. Singletary, 715 So. 2d 930 (Fla. 1998).

CONSTITUTIONAL PROVISIONS

Respondent accepts as accurate Petitioner's statement regarding the applicable constitutional provisions involved.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. § 1257 and Rule 10(c). Section 1257(a) is the appropriate provision to the extent that the central issue in this petition is whether petitioner received effective assistance of appellate counsel as guaranteed to him under the United States Constitution. However, petitioner cannot demonstrate that this

Court should exercise its discretion to review this claim.

Nor can jurisdiction be found under Rule 10(c) since petitioner cannot demonstrate that there is any conflict between the opinion of the Florida Supreme Court and "relevant decisions of this Court." **Petition at 3.**

STATEMENT OF THE CASE

The Florida Supreme Court entered its opinion on May 14, 1998. A motion for rehearing was denied on August 7, 1998. Petitioner is now seeking certiorari review in this Court.

STATEMENT OF THE FACTS

Respondent rejects Petitioner's statement of the facts as it contains a slanted and somewhat inaccurate version of the facts. Petitioner's attempt to bolster that rendition with inappropriate editorialization also warrants a rejection of same. A rendition of the facts germane to resolution of this claim appears in the Florida Supreme Court opinion. **Petitioner's appendix at A1-14**; Van Poyck 715 So. 2d at 931. An accurate recount of how the issue under review was presented to the Florida Supreme Court appears in the Respondent's appendix A. Also included in appendix B to the state's response is Van Poyck's motion for rehearing. Finally, the Respondent's appendix C contains excerpts from the original record on appeal, which include the voir dire responses of jurors Moody and Bradford.

REASONS FOR DENYING THE WRIT

QUESTION I

WHETHER PETITIONER HAS PROPERLY EXHAUSTED THIS CLAIM IN STATE COURT BELOW. (Petitioner's Question I restated).

As noted above, petitioner was convicted of, and sentenced to death for, the first-degree murder of correctional officer Fred Griffis. On appeal, petitioner challenged the competency of two jurors Brushci and Abramis. The Florida Supreme Court denied this claim since neither juror ultimately sat, and since both were excused *sua sponte* by the trial court; therefore, the issue became moot. Van Poyck, 560 So. 2d at 560/1066,1070 (Fla. 1990). Petitioner then unsuccessfully challenged his conviction and sentence in a motion for postconviction relief. Van Poyck v. State, 694 So. 2d 686 (Fla.), cert. denied, __ U.S. __, 118 S.Ct. 559, 139 L. Ed. 2d 400 (1997). He also unsuccessfully challenged the effectiveness of appellate counsel in a habeas petition to the Florida Supreme Court. Therein, petitioner accused appellate counsel of failing to properly present on appeal an issue regarding the trial court's erroneous denial of seven challenges for cause. Van Poyck v. Singletary, 715 So.2d 930 (Fla. 1998). It is the denial of that claim in state court that provides petitioner's basis for certiorari review here.

At trial, petitioner challenged for cause the following potential jurors: Ms. Busto, Ms. Moker, Mr. Carter, Mr. Nickerson, Mr. Miller, Mr. Farmer, and Mr. Aldridge. **Petitioner's appendix at A4-12**; Van Poyck, 715 So. 2d at 933. In his state habeas petition, although Van Poyck conceded that he struck all seven jurors with peremptory challenges, he

contended that the trial court improperly denied his challenges for cause, thereby forcing him to accept two objectionable jurors: Ms. Moody and Mrs. Bradford. He did not, however, argue how either Ms. Moody or Mrs. Bradford was objectionable. Rather, he merely alleged that he had preserved his argument for review by challenging Moody and Bradford for cause and by alleging that he would have stricken them peremptorily if he had not had to use his peremptories to strike the seven other objectionable jurors. In fact, Van Poyck concluded his argument to the Florida Supreme Court as follows:

> This undermines any confidence in the appellate process and mandates either a new trial (as to those jurors who expressed a belief in Mr. Van Poyck's guilt: Busto, Farmer and Aldridge) or sentencing hearing (as to those jurors who were biased towards the death penalty: Busto, Moker, Carter, Nickerson, Miller and Farmer). The trial court's error in refusing to grant a challenge for cause can never be harmless error.

Respondent's appendix at A24. Ultimately, in denying his state habeas petition, the Florida Supreme Court held, "In conclusion, we find that Van Poyck's appellate counsel did not render ineffective assistance for failing to pursue and argue Van Poyck's claim that the other seven venirepersons were biased or prejudiced. See Williamson v. Dugger, 651 So.2d 84, 86 (Fla.1994); See Chandler v. Dugger, 634 So.2d 1066, 1068 (Fla.1994)." **Petitioner's appendix at A15**; Van Poyck, 715 So. 2d at 934.

Petitioner now contends, however, that the Florida Supreme Court's analysis should have focused on the competency of Moody and Bradford, and not on the

competency of the other seven jurors. Petitioner accuses the Florida Supreme Court of misapplying the principles of Ross v. Oklahoma, 487 U.S. 81 (1988), by strictly reviewing the trial court's denial of cause challenges for the seven jurors whom petitioner ultimately excused with peremptory challenges.

Petitioner's complaint regarding the Florida Supreme Court's treatment of the issue, however, is disingenuous. Petitioner's state habeas petition focused exclusively on the seven jurors whom he initially challenged for cause and later excused peremptorily. He did not recount the actual responses of the two jurors who actually sat: Moody and Bradford. Nor did he allege in any way that they were "objectionable." **Respondent's appendix at A3-A24.** The pleadings filed bytr petitioner make it evident that the Florida Supreme Court addressed the issue in the identical fashion as it was presented in the petition.[1]

Van Poyck cannot now complain to this Court that the state supreme court's analysis was flawed. Any attempt to allege error by the state supreme court as a rationale for review in this petition borders on the frivolous. More importantly, his failure to raise the same argument in the state supreme court that he raises in this Court precludes this Court's review. This Court has repeatedly stated that review of state court judgments pursuant to 28 U.S.C. § 1257 will be precluded if the federal claim has not been fairly presented to the state court. Cardinale v. Louisiana, 394 U.S. 437 (1969); Webb v. Webb, 451 U.S. 493, 495 (1981); Adams v. Robertson, 520 U.S. 83 (1997);

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[1] Petitioner's motion for rehearing before the Florida Supreme Court also did not point out to the court that its analysis was allegedly flawed under Ross v. Oklahoma 487 U.S. 81 (1988). In fact, Ross was not mentioned anywhere in either the state habeas petition or the motion for rehearing. **Respondent's appendix A and B.**

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 493 (1981). Since petitioner failed to adequately present the requisite federal issue in state court, this Court lacks jurisdiction and must deny this petition.

QUESTION II

II. WHETHER THIS COURT SHOULD REVIEW A STATE COLLATERAL PROCEEDING WHERE PETITIONER DOES NOT FAIRLY PRESENT ANY FEDERAL QUESTION SINCE THE JURORS COMPLAINED ABOUT WERE NOT CONSTITUTIONALLY OBJECTIONABLE (Petitioner's questions II and II restated).

In his final two issues, Van Poyck alleges that review is warranted because (1) the instant case presents an opportunity for this Court to address an issue that it left undecided in Ross v. Oklahoma, 487 U.S. 81, 90 n. 4 (1988); and (2) petitioner's jury contained "two jurors who were unalterably in favor of the death penalty" in violation of both Ross and Morgan v. Illinois, 504 U.S. 719 (1992). Review is not warranted for the following reasons. First, the rhetorical question posed by this Court over ten years ago in Ross does not apply in the instant case. Therein, this Court reemphasized long-standing precedent that peremptory challenges are not constitutionally protected. Ross, 487 U.S. at 88. Ross had claimed that he had been "forced" to use a peremptory strike on a juror, after the trial court had erroneously refused to excuse the juror for cause. Id. at 85. According to this Court, Ross was not entitled to federal relief, however, because he was unable to demonstrate that any of the jurors who actually sat were in any way biased or otherwise incompetent. Id. In rejecting Ross's argument that he was unfairly required to use a peremptory

strike, this Court refused to attach any constitutional significance to the allotment of peremptory challenges. In fact, the Court recognized a state's right to require defendants to use peremptory challenges to cure a trial court's erroneous denial of cause challenges. Id. at 90. This Court further stated, "[I]t is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise." Id.

In a footnote seized upon by Van Poyck, this Court allegedly left open the question of whether a free-standing federal constitutional right to peremptory challenges would exist if such challenges were created under a state system that did not include any limitation on their use or purpose. In other words, if a state grants to a defendant the absolute freedom and unfettered discretion to the use of peremptory challenges, then the broader question "may" become: Under what circumstances would a defendant be denied federal due process if he or she were forced to use a peremptory challenge because of trial court error? Id. at 90-92 & n.4. Petitioner claims that the instant case presents the opportunity to address this broader question.

Fatal to petitioner's argument, however, is that Florida law does, in fact, place restrictions on the use of peremptory challenges. To preserve an issue regarding the erroneous denial of challenges for cause, a defendant must exhaust all of his peremptory challenges, request additional strikes, and identify the jurors whom he would strike with the additional challenges. If his request is then denied, a defendant must demonstrate on appeal that the panel contained an objectionable juror. Pentecost v. State, 545 So. 2d 861, 863 n.1 (Fla. 1989); Trotter v. State, 576 So. 2d 691, 693 (Fla. 1990). Florida law makes clear that peremptory challenges are simply a means to an end and do not possess any constitutional significance in and

of themselves. See Jefferson v. State, 595 So. 2d 38 (Fla. 1992) (right to impartial jury is constitutionally protected rather than right to use of peremptory challenges). As such, this Court must reject petitioner's invitation to address the question allegedly left open in Ross, since a defendant in Florida does not enjoy the unfettered freedom to the use of peremptory challenges as petitioner contends.[2]

Second, there exists two separate independent and adequate state grounds that warrant a denial of any further review. Any federal constitutional challenge to jurors Bradford and Moody was never fairly presented below.[3] Consequently, failure to afford the state court an opportunity to address the issue precludes review before this Court. See Cardinale v. Louisiana, 394 U.S. 437, (1969) (finding that review of state court judgments pursuant to 28 U.S.C. § 1257 is precluded if the federal claim not fairly presented to the state court); Webb v. Webb, 451 U.S. 493, 495 (1981) (same); Adams v. Robertson, 520 U.S. 83 (1997). Also, any challenge to juror Bradford is further barred since the issue was not preserved at trial and, therefore, procedurally barred before the Florida Supreme Court. **Petitioner's appendix at A3 n. 3.** This additional procedural defect precludes review in this Court. See Sochor v. Florida, 504 U.S. 527 (1992) (finding state procedural bar constitutes an independent and adequate state ground which precludes federal review); Coleman v. Thompson, 501 U.S. 722 (1991) (same).

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[2] Nor can there be any question that this Court has consistently determined since Ross that peremptory challenges are not constitutionally protected. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991); Georgia v. McCollum, 505 U.S. 42, 57 (1992); J.E.B. v. Alabama, 511 U.S. 127, 137 n.7 (1994).

[3] See respondent's argument to Question I.

Without waiving the dispositive arguments presented above, respondent will address the merits of the claim. As noted in Question I, the claim as presented in state court alleged that appellate counsel was ineffective for failing to challenge the trial court's erroneous denial of seven challenges for cause. As already stated above, and conceded by petitioner, any challenge to a trial court's denial of a challenge for cause must focus on the jurors who actually sat. Ross, 487 U.S. at 86. Therefore, in the instant petition, Van Poyck must demonstrate that counsel's failure to challenge the competency of jurors Bradford and Moody resulted in both deficient performance and prejudice under the requirements of Strickland v. Washington, 466 U.S. 668, 687 (1984).

A review of the record and of the Florida Supreme Court's opinion demonstrates that petitioner cannot establish his claim. First, petitioner fails to acknowledge the Florida Supreme Court's finding that any challenge to the competency of juror Bradford had been waived by trial counsel's failure to preserve the issue for appeal. Van Poyck, 715 So. 2d at 931, n.3. It is axiomatic that appellate counsel cannot be deemed ineffective for failing to pursue an issue that was not preserved at trial. Jackson v. Dugger, 931 F. 2d 712, 715 (11th Cir. 1991); Bertolotti v. Dugger, 883 F.2d 1503, 1523 (11th Cir.1989); see also Groover v. Singletary, 656 So. 2d 424 (Fla. 1995); Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993); Medina v. Dugger, 586 So. 2d 317, 318 (Fla. 1991); cf. Jones v. Barnes, 463 U.S. 745, 751-753 (1983)(finding that effective appellate counsel is not required to raise every conceivable issue).

Second, petitioner fails to present to this Court any of the actual responses given by jurors Bradford and Moody. Rather, he devotes all of the factual recitation to the irrelevant responses of the seven potential jurors who never sat. **Petition**

at 7-17. Even if he were to establish that the trial court should have granted any or all of his seven challenges for cause, petitioner does not demonstrate how jurors Moody and Bradford were incompetent to sit under the requirements of Ross and Wainwright v. Witt, 469 U.S. 421 (1985). Consequently, as presented, petitioner has failed to even present this Court with a federal question to review. Ross, 487 U.S. at 88 (ruling that there is no federal constitutional right to peremptory challenges).

Third, Van Poyck argues that he is entitled to relief because jurors Moody and Bradford were unalterably in favor of the death penalty. Jurors who express such fixed views of the death penalty, he claims, must be excused for cause. Morgan v. Illinois, 504 U.S. 719 (1992). This argument, however, is both factually and legally incorrect. Both jurors stated that, although they were in favor of the death penalty, neither would automatically vote for it. Ms. Moody never expressed any difficulty in being able to render a fair and impartial verdict. She stated that she would not prejudge the case, but rather would decide the case based on the evidence presented. (R 509). She consistently and unequivocally stated that she would follow the law and would not automatically recommend the death penalty.[4] (R 511-514). **Respondent's appendix at C11-21.** Likewise, Ms. Bradford stated that she had no preconceived notion of guilt; the case should be tried in the courtroom and not in the media. (R 866). She indicated that her opinion about the appropriateness of the death penalty depended on the facts of the case and although she favored the

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[4] Petitioner did not challenge Ms. Moody for cause at the time she gave her responses. It was not until after Van Poyck used all of his available peremptory strikes that he mentioned Moody as someone he wanted to remove either for cause or peremptorily.

death penalty she would not automatically recommend death.[5] (R 871). **Respondent's appendix at C1-C10.**

Neither Bradford nor Moody expressed opinions similar to those of the jurors in Morgan, upon which petitioner relies.[6] This Court granted relief in Morgan based on the trial court's refusal to allow the defendant an opportunity to conduct further voir dire of certain jurors based on the initial responses. Morgan, 504 U.S. at 736. According to this Court, given those jurors' extreme sentiments in favor of the death penalty, the defendant should have been permitted to question them further.

In the instant case, Van Poyck was never precluded from questioning Moody, Bradford, or any other juror, regarding their views on the death penalty. And the record does not support any explicit or implicit allegation to the contrary. Consequently, Morgan offers no support for petitioner's claim.

In conclusion, this Court must deny review. Both jurors expressed unequivocal assertions that they would follow their oath as jurors and decide this case strictly on the evidence presented. The law requires no more. See Witt, 469 U.S. at

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[5] Trial counsel did not use an available peremptory strike to remove Bradford at the time she gave her responses, nor did he identify Bradford as someone he would strike if he were given an additional peremptory challenge.

[6] Although petitioner also relies on the Florida Supreme Court's dissenting opinion in his case for support, he fails to point out that the dissenters determined that juror Moody's responses did not warrant a challenge for cause. **Petitioner's appendix at A26 n.6**; Van Poyck v. Singletary, 715 So. 2d 930, 934 n.6. The dissenters also noted that any challenge regarding Bradford was procedurally barred. Id. n.3.

424. Therefore, appellate counsel was not ineffective for failing to question the competency of either juror Moody or Bradford. See Chandler v. State, 634 So. 2d 1066, 1068 (Fla. 1993) (rejecting claim of ineffective assistance of appellate counsel because counsel is not expected to raise nonmeritorious claims); Groover v. Singletary, 656 So. 2d 424 (Fla. 1995) (same); Jackson v. Dugger, 931 F. 2d 712, 715 (11th Cir. 1991).

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK, Petitioner, v. HARRY K. SINGLETARY, JR., Secretary, Florida Department of Corrections, Respondent.	)	Case No. 89,870

PETITION FOR EXTRAORDINARY RELIEF
AND FOR WRIT OF HABEAS CORPUS

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GROUNDS FOR HABEAS RELIEF

I. MR. VAN POYCK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON HIS DIRECT APPEAL WHEN APPELLATE COUNSEL FAILED TO ADEQUATELY RAISE THE ISSUE OF THE TRIAL COURT'S ERROR IN REFUSING TO GRANT DEFENSE CHALLENGES FOR CAUSE REGARDING JURORS WHO INDICATED THAT THEY WOULD AUTOMATICALLY VOTE FOR DEATH, AND WHO WERE CONVINCED OF MR. VAN POYCK'S GUILT, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Mr. Van Poyck's first claim is based on the fundamental Sixth and Fourteenth Amendment premise that a defendant in a capital case is entitled to have that case heard by a jury with no preconceived notions of guilt or personal views that death is always the appropriate sentence for one convicted of first degree murder. Such jurors must be struck for cause. It is reversible constitutional error if they are not --even if the juror or jurors do not sit on the panel, so long as the defendant then uses a peremptory strike on that juror or jurors and then does not have one available to strike another objectionable juror. That circumstance occurred here. Unfortunately, for Mr. Van

Poyck, his appellate counsel named the wrong juror, then compounded the problem by failing to articulate a coherent argument on the issue, cite any relevant authority or engage in any analysis whatsoever.

A. The Trial Court Committed Reversible Error Denying For Cause Challenges To Impartial Jurors, Thereby Requiring Mr. Van Poyck To Use Peremptory Challenges And Then Denying Additional Requested Peremptory Challenges.

As a starting point, a review of the underlying legal error involved is in order. A juror must be struck for cause if so challenged and "there is basis for any reasonable doubt as to any jurors possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial ...." Singer v. State, 109 So. 2d 7, 24 (Fla. 1959) (emphasis added). If a potential juror demonstrates a bias toward the death penalty, the juror must be excused even if he later states that he would follow the court's instructions and the law. See, e.g., Bryant v. State, 656 So. 2d 426, 428 (Fla. 1995); Floyd v. State, 569 So.2d 1225, 1230 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991); Hill v. State, 477 So. 2d 552, 555 (Fla. 1985). Similarly, a court must strike for cause a juror who does not presume the defendant innocent or who expects the defendant to produce evidence of his innocence, again even if he later says he will follow the Court's instructions. See, e.g., Hamilton v. State, 547 So.2d 630, 632 (Fla. 1989); Huber v. State, 669 So.2d 1079,1081 (Fla. 4th DCA 1996); Perea v. State, 657 So. 2d 8, 9 (Fla. 3d DCA), rev. denied, 662 S.2d 632 (Fla. 1995).

It is per se reversible error for the court to erroneously deny a for cause challenge if the defendant then uses a

peremptory challenge to strike the juror, eventually exhausts his peremptory challenges and asks for, but is denied, an additional peremptory challenge. Trotter v. State, 576 So.2d 691, 693 (Fla. 1991). The defendant must identify a juror that he found objectionable who sat on the jury after the court denied his request for an additional peremptory challenge. The juror need only be somehow objectionable--the defendant need not show that the juror should have been struck for cause. Id., Diaz v. State, 608 So.2d 888, 890 (Fla. 3d DCA 1992), rev. denied, 613 So. 2d 9 (Fla 1993). In the case at bar, two such objectionable jurors eventually sat on Mr. Van Poyck's jury: Goldie Moody and Mary Bradford. Both were challenged for cause, unsuccessfully, and both sat on the jury because Mr. Van Poyck was forced to expend his peremptory challenges on other jurors who should have been excused for cause.

1. The Trial Court Erroneously Denied For Cause Challenges To Pro-death Jurors And Jurors Who Did Not Presume Mr. Van Poyck To Be Innocent.

During jury selection in this matter, Mr. Van Poyck moved to strike for cause several potential jurors, which challenges the Court denied. Mr. Van Poyck was then forced to use peremptory challenges on the venirepersons who had demonstrated a bias for the death penalty and/or a presumption of Mr. Van Poyck's guilt. Specifically, Wilma Busto evidenced a clear bias for the death penalty and said she would require Mr. Van Poyck to submit evidence of his innocence:

THE COURT: Do you feel that you, personally, could sit on a jury and hear the evidence and hear my instructions on the law and follow them and personally make a recommendation of death?

MS. BUSTO: Yes.

THE COURT: Do you feel in the alternative that you could personally recommend life?

MS. BUSTO: No.

THE COURT: You think you would recommend death in all cases?

MS. BUSTO: If I considered that the person is a criminal then --

R. 724-25.

* * * *

THE COURT: Suppose an aggravated factor, that aggravated factor is presented, can you conceive of an aggravating factor of somebody having a prior record, being a criminal, would you conceive of a case where you would bring back a life recommendation even with that aggravating factor knowing the person is a criminal?

MS. BUSTO: No. If he's already a criminal, he's going to be a criminal. That's the way I think about it.

MR. KLEIN: Only appropriate sentence in a case where somebody like that who's already criminal would be death.

MS. BUSTO: Yeah.

R. 728-29.

* * * *

MR. KLEIN: Would you, if you knew that, let's put it this way, Miss Busto, would you make me present any evidence on behalf of the defendant to prove that --

MS. BUSTO: Yes.

MR. KLEIN: -- that he was innocent?

MS. BUSTO: Yes. I would like to see some proof, yes.

R. 730. This exchange is indistinguishable from the voir dire in Hill, 477 So.2d at 555, where the Court found the trial court erred by not striking the juror for cause. See also Hamilton v. State, 547 So.2d 630, 632 (Fla. 1989) (juror who said she would require the defendant to present evidence to demonstrate he was not guilty should have been struck for cause). The Court here denied the defendant's challenge for cause, R. 733, forcing him to strike Ms. Busto from the panel with a peremptory challenge. R. 1344.

Linda Moker also demonstrated an unacceptable bias for the death penalty:

MR. KLEIN: Suppose the case involves the shooting of a police officer or prison guard. Would you think that that kind of first degree murder if it was done in premeditation would automatically warrant the death penalty?

S. MOKER: Yes, I believe so.

MR. KLEIN: Are any circumstances that you can think of under which you would not recommend the death

penalty other than that kind of case involving a premeditated killing of a police officer or a prison guard?

MS. MOKER: Premeditated, no, I don't think so.

MR. KLEIN: Do you feel strongly about that? How strongly is that belief?

MS. MOKER: Quite strong.

* * * *

R. 641-42. Mr. Van Poyck challenged Ms. Moker for cause, which the Court denied, R. 1131, forcing the defense to use another peremptory challenge. R. 1131-32.

Similarly, Charles Carter evidenced a pro-death penalty bias:

MR. DUBINER: If you found someone guilty of premeditated first degree murder and let me even add something else, premeditated first degree murder of a police officer or prison guard would you think that the death penalty would be an appropriate penalty in that case?

MR. CARTER: I think it would be the appropriate punishment regardless of whether it was a civilian or officer.

MR. DUBINER: That's just because it's premeditated?

MR. CARTER: Exactly.

MR. DUBINER: In a premeditated first degree murder case, then you think that the appropriate punishment is

the death penalty?

MR. CARTER: Yes.

MR. DUBINER: And you feel that way in basically all premeditated first degree murder cases. We're talking about premeditated, not other types.

MR. CARTER: Yes.

R. 842-43. Mr. Carter was challenged for cause, which the Court denied. R. 844. He was then struck using one of the defendant's peremptory challenges. R. 1207.

Ronald Nickerson demonstrated a pro-death penalty bias and his inability to follow the Court's instructions:

MR. KLEIN: I don't know whether I'm overstepping my bounds or not, but Mr. Nickerson, initially, at least, do you have any preconceptions about what kind of a case would deserve the death penalty?

Mr. NICKERSON: Most any kind of a premeditated murder deserves the death penalty.

Mr. KLEIN: You say most any kind. Do you feel so strongly about the death penalty that you think you would vote for it, for death in any kind of case where you found the Defendant guilty of premeditated murder?

Mr. NICKERSON: I probably would.

* * * *

R. 457.

THE COURT: Would you follow those instructions irregardless of your personal views? Because I am telling you, you have to follow them?

MR. NICKERSON: I, I probably would, but I did not know for sure. I would have to hear all of the evidence.

* * * *

R. 458-59. The Court denied the defendant's for cause challenges to Mr. Nickerson, R. 460, and Mr. Van Poyck used yet another peremptory challenge to strike him. R. 1283.

Similarly, Derek Miller demonstrated an unacceptable pro-death penalty bias:

THE COURT: Okay, would you agree, sir, that it is a fair statement that capital punishment or the death penalty is not an appropriate sentence in all first degree murder cases, that it depends on the case?

MR. MILLER: Right. The thing, if a person is without a doubt proven guilty, you know, for a rape or murder, I believe, you know, death ought to be the sentence.

THE COURT: In every case no matter what?

MR. MILLER: Without a doubt, yes, if it's proved without a doubt.

* * * *

R. 628-69.

MR. KLEIN: Mr. Miller, you told us before

that you would consider yourself strongly in favor of the death penalty, capital punishment?

MR. MILLER: Yes, sir.

MR. KLEIN: That is a recently-held belief or have you felt that way before?

MR. MILLER: I felt that way a long time. Feel more strongly about it because of the prison overcrowding, the taxpayers' money, you know, you know, going to house and feed those--

* * * *

R. 632.

MR. KLEIN: Would you feel that same way if you were to know that the alternative to the death penalty that a person should spend the rest of his life in prison, you as a taxpayer would have to house and feed him for the rest of his natural life, would you, would you feel hesitant to give a life recommendation under those circumstances?

MR. MILLER: Yes.

* * * *

R. 634. The Court denied the defendant's challenges for cause, R. 636, and a peremptory challenge was later used. R. 1206.

George Farmer showed both a pro-death penalty bias and a presumption that Mr. Van Poyck was guilty:

MR. KLEIN: Are there some mitigating

circumstances under those circumstances that could convince you to bring back a recommendation of life?

MR. FARMER: As opposed to the death penalty?

MR. KLEIN: Yes.

MR. FARMER: Yes, I think I would so long as you did not plan to do it, then a murder ended up happening. I mean, you plan to escape and all this stuff and you have this big plan all made up. And if somebody gets killed, it's okay; if somebody did not get it, killed, it's okay to then, that would mean you really did not plan ahead to kill somebody.

MR. KLEIN: Okay. What about --

MR. FARMER: Make sense?

MR. KLEIN: Yeah, it does, actually. What about if the case, how do you feel if the case involved the death of a prison guard, police officer, you feel the same way?

MR. FARMER: No, I guess I would have to change my mind on that.

MR. KLEIN: Okay. Why would that be?

MR. FARMER: Because these guys are trying to do a service to society and they are trying to be protected as well as they would be.

MR. KLEIN: Okay. Well, how would you feel, generally, about somebody if you knew they intentionally killed a police officer or a prison guard?

MR. FARMER: I would have to bring the death penalty.

* * * *

R. 659-61.

MR. KLEIN: From, as a result of what you have heard or heard around you, on TV about this case, you feel that Mr. Van Poyck is guilty as he sits here?

MR. FARMER: You know, I do not know what evidence you're going to bring in both directions.

MR. KLEIN: From what you have read?

MR. FARMER: From what I've read, this man is accused of this crime.

MR. KLEIN: Well, from what you read and what you think he's probably guilty?

MR. FARMER: Okay, yeah, I think he is probably guilty.

* * * *

R.662-63. The Court denied the defendant's challenge for cause, R. 665, and Mr. Van Poyck was forced to use yet another peremptory challenge. R. 1354.

Finally, Frank Aldridge demonstrated a presumption of Mr. Van Poyck's guilt, which he "hoped" he could put aside. Yet he expected Mr. Van Poyck to present evidence of his innocence:

THE COURT: What you read in the paper, did it really stick with you, I mean or did you breeze through it?

MR. ALDRIDGE: I read it in the paper Monday morning because I was coming to jury duty, it stuck in my mind.

THE COURT: That's a recapitulation or where they go back?

MR. ALDRIDGE: Uh-huh.

THE COURT: Could you disregard what you've read in that article Monday and base the verdict solely on what you hear in the courtroom and the instructions of the law that I would give you?

MR. ALDRIDGE: I don't know.

THE COURT: Have you formed an opinion as to the person's guilt or innocence based on that article in the paper? Obviously, we want a jury to find a person guilty or not guilty based on what they hear in the courtroom, not on what you read in the paper. Could you do that?

MR. ALDRIDGE: I understand that, but possibly I have formed an opinion.

* * * *

R. 696-97.

MR. KLEIN: Mr. Aldridge, as a result of what you have read, have you formed any opinion, at all, about this case or about Mr. Van Poyck?

MR. ALDRIDGE: Based on the facts presented in the newspaper, my opinion is that the defendant is guilty.

MR. KLEIN: Okay. Based upon what you read, would you have, would you, before you could bring back a verdict of not guilty would you ask for evidence, would you ask for us as defense to present evidence to persuade you otherwise?

MR. ALDRIDGE: Yes, certainly.

MR. KLEIN: Would you have a difficult time finding Mr. Van Poyck not guilty unless you heard some evidence from the defense to convince you that he was innocent in view of what you have heard?

MR. ALDRIDGE: Yes, in view of what I have read, yes.

THE COURT: Mr. Aldridge, let me ask you something. If I instructed you under the law of our country, that under the constitution Mr. Van Poyck as he sits here right at this moment is presumed innocent and that presumption stays with him until the time the state presents evidence sufficient for you to find him guilty beyond a reasonable doubt, would you be able to follow instructions?

MR. ALDRIDGE: I would hope that I could.

* * * *

R. 703-04.

THE COURT: Would you be able to follow that if you were a juror and not form an opinion or fix in your mind

a verdict until you have heard all the evidence in the courtroom?

MR. ALDRIDGE: I would hope that I could.

* * * *

THE COURT: Also, under our system the defendant in any criminal case is not required to testify nor present evidence. The reason for that is that the burden of proof in a criminal case is on the state, not on the defense. Would you agree with that?

MR. ALDRIDGE: Yes.

THE COURT: Would you be able to do that even if you read the papers?

MR. ALDRIDGE: I would hope that I could.

* * * *

R. 705. The Court denied Mr. Van Poyck's motion to strike Mr. Aldridge for cause, R. 706, and Mr. Van Poyck used a peremptory challenge to prevent him from sitting. R 1132.[7]

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[7] Mr. Aldridge's comments were similar to those in Huber v. State, 669 So.2d 1079, 1081 (Fla. 4th DCA 996), where a potential juror said he could not presume the defendant innocent but then recanted that statement. The Court held that the juror did not show the required impartiality: "[w]hen a juror Admits that he 'probably' would be prejudiced but says he 'probably' could follow the Judge's instructions, it is error for the trial judge to refuse to dismiss him for cause." Id. at 1081; see also Jones v. State, 660 So.2d 291, 292 (Fla. 2d DCA 1995). Here, Mr. Aldridge made virtually undistinguishable comments and should have also been struck for cause.

Finally, Mary Bradford was challenged for cause, which challenge was denied. R. 871, 873. As a result, this objectionable juror actually sat on Mr. Van Poyck's jury. Had Mr. Van Poyck received the additional peremptories he should have received, he would have struck this objectionable juror.

Although most of the jurors discussed above eventually said they would follow the Court's instructions, such responses did not render them unobjectionable; the equivocal nature of their responses as a whole raised a reasonable doubt as to their impartiality. In fact, defense counsel Michael Dubiner moved to strike the entire panel based on death qualification. R. 1368-69. This motion was denied. The trial court thus erred in not striking the jurors for cause.

2. The Trial Court Improperly Denied The Defendant An Additional Peremptory Challenge.

After exhausting his peremptory challenges, most of them on jurors who should have been struck for cause, Mr. Van Poyck moved to strike Goldie Moody for cause, which the Court denied. R. 1360. Mr. Van Poyck's trial counsel then asked the Court for an additional peremptory challenge so he could strike Ms. Moody. R. 1363. The Court said that it would only grant an additional peremptory challenge if Mr. Van Poyck waived one of his other rights - - the right to conduct voir dire on a juror the court wanted to disqualify "for cause."

MR. DUBINER: Do we get the additional peremptory?

THE COURT: I am going to make a bargain with you, that the Appellate Court won't like if it ever gets up there. I will go along with that, if that guy Chase gets up there, he goes for cause. That's the guy in the methadone program.

MR. KLEIN: We cannot agree until we examine him. Other than the fact he's on methadone --

THE COURT: That guy has not been in here ten minutes. He has been in and out of the revolving doors.

I am going to bump him if he gets up here .....

* * * *

R. at 1364.

MR. KLEIN: We cannot live with the court's opinion. Mr. Chase, I think is his name, going in and out of the court, we will excuse him for cause at that point. We cannot live with that. We'd just as soon withdraw our motion for extra peremptories at this point rather than have Mr. Chase summarily removed for cause.

* * * *

R. 1365.

A defendant has a right to conduct individual voir dire of a juror that is being struck for cause. O'Connell v. State, 480 So.2d 1284, 1286-87 (Fla. 1985); see also Boggs v. State, 667 So.2d 765, 768 (Fla. 1996); Hernandez v.State, 621 So.2d 1353 (Fla. 1993); Green v. State, 575 So.2d 796 (Fla. 4th DCA 1991). In O'Connell, the trial court struck a juror for cause and d denied defense counsel's objection that he had had no opportunity to first examine the juror. The Supreme Court cited Florida Rule of Criminal Procedure 3.300(b), which allows both sides to examine prospective jurors orally. It then recognized that "there may be situations where the trial court is justified in curtailing voir dire, [and where] it has

considerable discretion in determining the extent of counsel's examination of prospective jurors." 480 So.2d at 1286 (internal quotations and citations omitted). However, the trial court's decision in O'Connell could not be viewed as an "exercise of control of reasonably repetitious and argumentative voir dire questioning." Id. (internal quotations and citations omitted). The court thus erred, requiring a new trial.

Similarly in Green, supra, the trial court had struck two jurors who expressed doubt about their ability to be impartial. The Court of Appeals held that the trial court erred in striking the jurors without permitting defense counsel to question them because its decision could not be categorized as the discretionary avoidance of repetitive or argumentative voir dire. 575 So.2d at 797.

Here, the trial court refused to allow the defense to conduct voir dire of Mr. Chase, whom it said it intended to strike for cause, by conditioning the defendant's request for additional peremptory challenges on his waiver of his right to conduct voir dire of another juror before he was struck. This was error: as in O'Connell and Green, the trial court's refusal to allow any questioning cannot be considered an exercise of the court's discretion to control repetitive or argumentative questioning. Mr. Van Poyck's trial counsel had not posed any questions to Mr. Chase and was told he would not be allowed to do so. Thus, by conditioning the requested additional peremptory challenges, which was Mr. Van Poyck's right, on his waiver of another right, the trial court effectively denied the additional peremptory challenge. As a result, at least two objectionable jurors, Goldie Moody and Mary Bradford,[8]

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[8] Although Mr. Van Poyck did not specifically ask for an additional peremptory challenge to use on Ms. Bradford, the court's prior denial of his challenge to her for cause and the

actually sat on Mr. Van Poyck's jury. Thus, all the elements of reversible error was present in this case. The only remaining issue is ow that reversible error was presented by appellate counsel.

B. Appellate Counsel's Performance Constituted Ineffective Assistance Of Counsel

In order to prove ineffective assistance of appellate counsel, Mr. Van Poyck must demonstrate "(1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance; and (2) the deficiencies of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Williamson v. Dugger, 651 So.2d 84, 86 (Fla. 1994), cert. denied, 116 S.Ct. 146 (1995), quoting Johnson v. Wainwright, 463 So.2d 207 (Fla. 1984). While appellate counsel is not required to raise every conceivable argument on appeal, he must present errors "which worked some detriment to the defendant or violated any of his substantive or prodecural rights." Johnson, 463 So.2d at 211.

1. Appellate Counsel's Performance Was Deficient.

Here, appellate counsel rendered ineffective assistance in a very specific, and egregious manner: he identified the wrong jurors and then compounded the error by failing to adequately argue the issue in any depth, with any discussion, analysis or citations to any relevant authority. As a result this Court on direct appeal rejected the argument, specifically because the jurors who were identified (i.e., the wrong jurors) subsequently had been struck "for personal reasons."

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court's proposed "deal"would have made it a futile request.

In the direct appeal, counsel's brief claimed that denials of "for cause" challenges to two jurors were erroneously denied. The argument regarding the improper denial of challenges for cause consisted of one sentence:: "In two instances, Brousette [sic] (R. 812-825) and Abefarmis (R. 741-750), denial of the defendant's motions to strike for cause was error." (Direct Appeal Brief, App. 1, p. 58). Appellate counsel provided no argument or discussion on this issue, no legal authority relevant to the issue and pointed to no objectionable juror who was permitted to sit on Mr. Van Poyck's jury.

Instead, appellate counsel referenced two jurors who, although unsuccessfully challenged for cause, were later excused by the Court for personal reasons. This erroneously implied that Mr. Van Poyck did not have to use any of his peremptory challenges on those jurors and they did not sit on his jury. They therefore did not support the argument.

Following the filing of the initial brief, appellate counsel's colleague filed a notice of intent to rely on additional authority, App. 2, which cited, among others, a few cases discussing the erroneous denial of for cause challenges and requests for additional peremptory challenges. This notice did not indicate which arguments any of the cited cases supported or any discussion of the cases and their applicability. This obviously did not cure the problem with the wrong identification -- and did not cure the previous lack of argument either. See Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985) (descriptive listing of cases without application to facts of case was deficient).

Unlike the "inventive and highly technical" argument involved in Johnson, the argument in this case was obvious from the Record and straightforward. Indeed, its merit was

recognized by the trial court even as it committed error -- it recognized that its "bargain" was something the Appellate Court "won't like." R. 1364. The trial court's reticence was well-founded-- the argument was based on recent, controlling case law, including Hill, 477 So.2d 553 (Fla. 1985) and O'Connell, 480 So 2d 1284 (Fla. 1985), both of which had decided well before the direct appeal. See State v. Stacey, 482 So.2d 1350, 1351 (Fla. 1985) (counsel was ineffective in failing to research and raise case law showing clear constitutional error based on existing authority)

Finally, the issue of impartial jury selection is one of paramount importance and cannot be ignored. In Wilson, 474 So.2d at 1163-64, the Court found appellate counsel deficient for failing to raise the sufficiency of the evidence for the jury's finding of premeditation and cursorily arguing the appropriateness of the death penalty, both of which it found were fundamental issues. The issue of the jury's impartiality and errors in the jury selection phase cannot be considered any less important than the issues deficiently raised (or not raised at all) in Wilson. [9]

2. Appellate Counsel's Deficient Performance Prejudiced The Defendant.

Appellate counsel's deficient performance clearly prejudiced Mr. Van Poyck and undermines any confidence in the appellate process, thus requiring that the writ be granted.

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[9] Nor can Appellate counsel's failure to adequately and correctly present this claim be considered tactical: counsel attempted to raise the error, but did so with no analysis and, worse yet, named the wrong jurors. His failure to raise this issue adequately must be found to fall below the norm of acceptable representation.

As a direct result of appellate counsel's deficient performance Mr. Van Poyck was deprived of the new trial and new penalty phase which he would have received on direct appeal had counsel's performance not been deficient. Van Poyck was denied a trial by a fair and impartial jury and absent appellate counsel's inexplicable failure to properly brief this issue Mr. Van Poyck would have received the new trial to which he was entitled. Certainly this Court cannot countenance an important appellate issue, in a capital case, which consisted of one sentence, devoid of supporting case law, and which named the wrong jurors. The naming of the wrong jurors alone resulted, inevitably, in rejection of the argument by this Court:

> "[w]e note, that although the pro-death jurors should have been excused for cause, the trial judge subsequently excused them for personal reasons. Consequently, Van Poyck was not required to exercise any peremptory challenges with regard to those jurors and that issue s moot." Van Poyck v. State, 564 So.2d 1066, 1071 (Fla. 1990).

It is telling that the Court found that the two jurors named in the direct appeal should have been struck for cause. i.e. reversal was not required only because they were subsequently struck for "personal reasons." The voir dire responses of the jurors who should have been named are virtually indistinguishable in content from those two named jurors, or jurors this Court held should have been struck in the cases cited above; this leads to the inescapable conclusion that, had the correct jurors been named, and had any kind of coherent argument been made, this Court would have found error in the trial court's denial of any number of Mr. Van Poyck's "for cause" challenges and in denial of additional peremptory challenges. This undermines any confidence in the

appellate process and mandates either a new trial (as to those jurors who expressed a belief in Mr. Van Poyck's guilt: Busto, Farmer and Aldridge) or sentencing hearing (as to those jurors who were biased towards the death penalty: Busto, Moker, Carter, Nickerson, Miller and Farmer). [10] The trial court's error in refusing to grant a challenge for cause can never be harmless error. Hill, 477 So.2d at 556.

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[10] See Reilly v. State, 557 So.2d 1365, 1367 (Fla. 1990); Huber, 669 So.2d at 1083 (new trial ordered when jurors not struck who presumed defendant guilty). See, e.g., Hill, 477 So. 2d at 556 (new sentencing hearing where jurors not struck who evidenced unacceptable pro death penalty bias).

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

WILLIAM VAN POYCK,

Petitioner,

vs. Case No. 89,870

HARRY K. SINGLETARY, JR.

Respondent.

_____/

PETITIONER'S MOTION FOR REHEARING AND/OR CLARIFICATION

This Court properly condemned trial court's deal as improper but failed to properly apply it to the Petitioner's habeas corpus appeal.

This Court held that Van Poyck's challenge as to one of the two (2) challenged jurors who actually sat on his jury "was not preserved for direct appeal.....because Van Poyck's trial counsel did not identify her as a venireperson whom he wanted to excuse through an additional peremptory challenge." Slip opinion at page 3, footnote 3. The Court was apparently referring to juror Bradford. However, the court has overlooked the fact that when trial counsel identified juror Moody and requested an additional peremptory, the trial court refused that request and then countered with its improper and unorthodox offer of as "deal." The trial court made it clear that any additional peremptories were contingent upon defense counsel accepting this "deal." This Court properly condemned this deal as improper, Slip opinion at page 1, footnote 2. However, the Court has overlooked the fact that once defense counsel rejected this "deal" it was clear that it was futile to continue naming objectional jurors.

The trial court made it clear that it would only grant additional peremptories if counsel accepted the deal. This improper counteroffer suffocated further inquiry and debate by Petitioner's trial counsel. Counsel made it clear that such a deal was unacceptable, and this Court agreed that it was improper. Under such circumstances, defense counsel should not be required to continue the debate where it is apparently futile. By unsuccessfully challenging juror Bradford for cause, Van Poyck had adequately identified her as "objectionable." It was clear that no further peremptories would be granted unless defense counsel agreed to the improper "deal," and since defense counsel refused the deal, there remained nothing more

for him to do. Any waiver or procedural default was clearly invited and created by the trial court's injection of this "deal" into the equation.

In holding that there was no ineffectiveness of appellate counsel, this Court did not individually analyze the two (2) prongs of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). This Court merely concluded that "we find that Van Poyck's appellate counsel did not render ineffective assistance for failing to pursue and argue Van Poyck's claim that the other seven venirepersons were biased or prejudiced." Slip opinion at page 6. Left unanswered is whether this Court is holding that appellate counsel's omissions and deficiencies did not rise to the level of constituting a substantial deficiency or of failing outside the range of professionally acceptable performance (the first prong of Strickland); or, whether this Court is holding that counsel's performance was deficient but that Van Poyck has failed to demonstrate prejudice flowing therefrom (the second prong of Strickland). Petitioner respectfully moves for clarification of this holding.

In order to hold that none of the challenged jurors were biased or objectionable, this Court took the highly unusual step of revisiting Van Poyck's direct appeal decision from 1990, and "reexamining the record." The Court reversed its unanimous 1990 holding that jurors Abufaris and Bruschi were clearly biased on objectional, and in an about face, declared that they were unbiased and unobjectionable. Apparently this was necessary because the responses of the seven (7) challenged jurors in the habeas petition were virtually identical to, or even more egregious than the responses of jurors Abufaris and Bruschi, whom the court had already declared, in 1990, were clearly_ biased and should have been excused for cause. Besides the clear violation of the "law of the case" doctrine by the majority, as already set forth in the dissenting opinion at

page 13, Van. Poyck submits that this Court has clearly violated one of the most settled principles of the standard of review for ineffective assistance of counsel. Strickland v. Washington, *supra*, clearly and repeatedly teaches that in evaluating a claim of ineffective assistance courts must "avoid the distorting effect of hindsight." Rather,

> a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.

466 U.S. at 690 (emphasis added). In Kimmelman v. Morris, 477 U.S. 365, 381, 106 S.Ct. 1574, 2586 (1986), the Court reiterated that

> The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error. .....

Thus, in evaluating this claim, this Court must take the perspective of 1990, not 1998. Van Poyck is entitled to have the underlying claim reviewed under the standard that existed in 1990. Had counsel properly briefed this issue in 1989-1990, then this Court, in 1990, would have found error and would have granted Van Poyck a new trial and/or new sentencing hearing. This is known because in 1990 this Court unanimously held that jurors Abufaris and Bruschi were clearly biased, objectionable, and should have been struck for cause. The other challenged jurors, not brief on direct appeal, gave identical or ever worse responses. Clearly, in 1990, this Court would have also found that these jurors should have been struck

for cause. It is only now, in 1990, under a new standard, that this Court now reaches a contrary result. However, had Van Poyck received the effective assistance of counsel to which he was entitled in 1990, the result would have been different. Thus, this Court is employing "the distorting effect of hindsight" forbidden by Strickland.

In order to prevail under his claim of ineffective assistance of counsel, Van Poyck's burden is to establish that there is "a reasonable probability" that the outcome would have been different had the issue been briefed on appeal in 1990. Strickland, *supra*, at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. See Groover v. Singletary, 656 So.2d 424 (Fla. 1995) (The question is "whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.") ; Johnson v. State, 593 So.2d 206, 209 (Fla. 1992) (A defendant must show a reasonable probability that, absent the deficient performance, the outcome would have been different. In Agan v. Singletary, 12 F.3d, 1012 at 1018 (11th Cir. 1993), the Court described the standard thusly:

> This "reasonable probability" of a different result is simply a probability sufficient to undermine confidence in the outcome of the case; a standard less than proof by a preponderance of the evidence. (Emphasis added).

In order to prevail on his claim Van Poyck is only required to demonstrate that there is a reasonable probability that, had this issue been properly briefed in 1990, the outcome

would have been different. This Court's opinion is totally lacking in the proper ineffective counsel analysis (which is the claim before the Court) and instead treats this case as if the underlying claim is before this Court on direct appeal. This is not the correct standard. Van Poyck submits that under Strickland he has met his burden and is entitled to a belated direct appeal.

APPENDIX C

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT,
CRIMINAL DIVISION
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA,

vs. CASE NO: 87-6736 CF A02
88-11116 CF A02

WILLIAM VAN POYCK,

Defendant.

_____/

VOLUME VII

JURY TRIAL

BEFORE THE HONORABLE MICHAEL MILLER

- - - -

Room 315
Palm Beach County Courthouse
West Palm Beach, Florida
Tuesday, November 1, 1998
Beginning at 1:30 o'clock, p.m.

THE COURT: You can step outside, sir. (Whereupon, Mr. Engle left the jury room.)

MR. GEESEY: No motion from the State.

MR. DUBINER: Nothing from the Defense.

THE CLERK: 518, Mary Bradford.

THE COURT: Have a seat, ma'am, how are you doing today?

MS. BRADFORD: All right, thank you.

THE COURT: We're here, ma'am, on the case entitled State of Florida versus Van Poyck. This is Mr. Van Poyck. This is Mr. Klein, that's Mr. Dubiner. The State is represented by Mr. Geesey and Miss Skiles.Ma'am, do the names Van Poyck, Valdez or O'Brien mean anything to have you read or heard anything in the news media concerning an incident where allegedly two people went to the doctor's office in West Palm Beach and attempted to remove a third person from custody and in the process a guard died?

MS. BRADFORD: I think I remember hearing something like that.

THE COURT: Obviously, didn't stick with you in great detail if it did?

MS. BRADFORD: I cannot really -- just something that's familiar.

THE COURT: Nothing that would cause you to have any preconceived notions or thoughts about a trial?

MS. ENGLE: I don't think so.

THE COURT: Would you agree that if a person is tried for a crime in this country that should be tried and either found guilty or not guilty based on the evidence received in the court of law and on the instructions of the law to the jury, not on what you hear from a news media source?

MS. BRADFORD: Yeah.

THE COURT: Ma'am, if a person is convicted of first degree murder, there could be a second hearing. At that hearing a jury would hear aggravating and mitigating circumstances and the instructions on the law as to what those mean. The jury would then take a vote and recommend a penalty to the judge. The recommendation would either be for life in prison

or death. The recommendation is one which carries very great weight, but the Court is the one that imposes the penalty.
If you were asked to tell your view on the death penalty, would you classify yourself as strongly in favor, strongly against, middle of the road or never thought about it much?

MS. ENGLE: I don't know what you mean by middle of the road. But I feel there are some circumstances that a person should be required to give their life for it.

THE COURT: Would you say then there are some that were and the requirement depends on the circumstances?

MS. BRADFORD: Yes.

THE COURT: Okay, would you agree, ma'am, there could be a set of circumstances where you could hear the trial if the person is found guilty of first degree murder, that you then go to the penalty phase and heard that evidence, the instructions on the law, and you, personally, could say from everything I have heard it sounds like I should recommend a penalty

of death. Could you personally do that as one of12 jurors making a recommendation?

MS. BRADFORD: Yes.

THE COURT: Would you agree that you also could make a recommendation of life in prison?

MS. BRADFORD: Yes.

THE COURT: Okay, Mr. Geesey.

MR. GEESEY: Ma'am, from your answers there is a little bit of hesitation there, but do you feel you could in the appropriate case recommend that a person be put to death?

MS. BRADFORD: Yes. It would be difficult, but I would have to definitely consider, consider it, but, yes.

MR.GEESEY: You believe that you could do that?

MS. BRADFORD: (Nods in the affirmative.)

MR. GEESEY: I think you agree it would not be fair to a Defendant if a jury were to recommend death in every case, right, that goes without saying?

MS. BRADFORD: I don't understand.

MR. GEESEY: It would not be fair to a Defendant if a jury were going to recommend death in each and every case of first degree murder. Do you agree with that?

MS. BRADFORD: Yes.

MR. GEESEY: And do you also agree it would not be fair to the State of Florida if a jury were going to recommend life in each and every first degree murder case?

MS. BRADFORD: Yes.

MR. GEESEY: Okay. So, what we're asking is for you to make a decision, make a recommendation to this Court based upon the law and based upon the facts of this particular case?

MS. BRADFORD: Yes.

MR. GEESEY: You believe you could do that?

MS. BRADFORD: Yes.

MR. GEESEY: Okay, hypothetically, if the case involves a killing, intentional killing of a law enforcement officer, could you set aside your personal feelings and make a recommendation to the Court

based upon the law the judge gives you?

MS. BRADFORD: Yes.

MR. GEESEY: Regarding anything that you have heard about this case, if anything comes back to you, you could put that out of your mind and again reach a decision based upon the evidence presented at trial and to that evidence alone?

MS. BRADFORD: That's my responsibility, yes.

MR. GEESEY: Okay, thank you, ma'am.

THE COURT: Mr. Dubiner?

MR. DUBINER: If I could ask you a couple of questions.

MS. BRADFORD: Uh-huh.

MR. DUBINER: Have you thought much about the death penalty?

MS. BRADFORD: Yes.

MR. DUBINER: Are there certain types of cases that you have thought about where you think the death penalty would be appropriate most times or all of the time?

MS. BRADFORD: Yes.

MR. DUBINER: Could you tell us those types of cases?

MS. BRADFORD: Where there was complete -- it's hard to express myself right now.

MR. DUBINER: You can calm down.

MS. BRADFORD: Just real lack of concern for human life.

MR. DUBINER: You have heard the term premeditated?

MS. BRADFORD: Yes.

MR. DUBINER: Have you thought about premeditated killing where somebody kills with premeditation, what you think about the death penalty in regards to that?

MS. BRADFORD: I think that one of the things that, that I feel that is that the death penalty is there for.

MR. DUBINER: Okay. Do you think that if premeditation was proven beyond a reasonable doubt that you would vote for the death penalty in every case where there was premeditation proven?

MS. BRADFORD: Yes, I guess.

MR. DUBINER: Okay, I don't have anything further, thank you.

THE COURT: Ma'am, do you agree that if you were on a case as a juror and premeditated murder was proven and the person was found guilty of that, that you would follow the instructions on the law and listen to the evidence on the aggravating and mitigating circumstances and base your recommendation on that evidence and those instructions rather than just a blanket saying of death?

MS. BRADFORD: Yes, yes.

THE COURT: Don't believe that every premeditated murder case automatically means it's a death recommendation?

MS. BRADFORD: That's, that's, you know, would be my number one concern is to follow the law and what, what you said.

THE COURT: Thank you.

MS. BRADFORD: I hope I appropriately answered that question.

THE COURT: We just want to know that you feel yourself. You cannot say anything wrong. There is no right or wrong answer.

MR. DUBINER: I would like to follow up just with a couple of questions or two.

THE COURT: All right.

MR. DUBINER: In terms of premeditation if that is proven beyond a reasonable doubt, what, what are your feelings with regards to that, the death penalty and premeditation? Certainly, I want to find out.

MS. BRADFORD: I guess I am not understanding your question real well. I guess what I said, real disregard for human life.

MR. DUBINER: If that is shown do you feel that if a disregard for human life is shown, do you think that the death penalty is always appropriate in that type of case? I know I'm putting you on the spot.

MS. BRADFORD: I guess what I am thinking, I would have to know more about what the case was, but, you know, to me a real blatant disregard for human life is, is to me, you know, worth the death penalty.

MR. DUBINER: I don't have anything further.

THE COURT: You can step outside, ma'am. Thank you.
(Whereupon, Miss Bradford left the jury room.)

THE COURT: Any motion by the State or the Defense?

MR. GEESEY: None from the State.

MR. DUBINER: We would move to challenge her for cause, Judge.

THE COURT: Denied.

THE CLERK: 515, Marianne. Botka.

THE COURT: Hi, Miss Botka, how are you today?

MS. MOODY: Yes.

MR. GEESEY: Thank you very much.

MR. KLEIN: Miss Moody, as a result of what you have heard about this case in the past, have you formed any impressions about who shot the prison guard or why?

MS. MOODY: I am trying to be honest and remember back, if it's even the --

frankly, nowadays you read so much about, you know, I am trying to think about it.

MR. KLEIN: Tell me what you are remembering?

MS. MOODY: What I am thinking, this might be is where someone was taken to a doctor or something and then they got out and the guard was killed. I think that may be the case. That's the one I have in mind, anyway.

MR. KLEIN: I think we're talking about the same case.

MS. MOODY: So, I do remember it vaguely.

MR. KLEIN: From what you read or heard, do you recollect anything about why the guard was shot or how he was shot or by whom he was shot?

MS. MOODY: I thought from what I am thinking back now, that he was shot because he would not give his gun away or would not give up, that the prisoner shot him because he would not give his, he would not, the guard would not let him go or something like that.

MR. KLEIN: Okay. Have you formed any

impressions, at all, about Mr. Van Poyck here, his name mean anything to you?

MS. MOODY: The name means nothing.

MR. KLEIN: Do you have any idea which one of the people?

MS. MOODY: No, I do not, no. He could have been either one of them.

MR. KLEIN: Did you read the paper this morning, the local paper?

MISS MOODY: Not this morning.

MR. KLEIN: Miss Moody, is there any kind of particular case, at all, that you think would, think warrants the death penalty in every case, in every circumstance?.

MISS MOODY: In every case and every circumstance?

MR. KLEIN: I mean is there any particular type of case?

MS. MOODY: If he were found guilty you mean?

MR. KLEIN: Uh-huh.

MS. MOODY: There are some cases I would assume they would, yes.

MR. KLEIN: You would not automatically recommend a sentence of death in every first degree murder case, would you?

MS. MOODY: No.

MR. KLEIN: Would you automatically recommend a sentence of death in every first degree murder case where the person is convicted of premeditated first degree intentional killing?

MS. MOODY: No.

MR. KLEIN: You would again weigh the mitigating and aggravating circumstances?

MS. MOODY: (Nods in the affirmative.)

MR. KLEIN: Okay. Is there, would you, assuming for a second the prison guard was shot and killed, would you automatically vote for a sentence of death because of that shot.

MS. MOODY: I find that very hard. I do not think I would.

MR. KLEIN: Okay.

MS. MOODY: But, I cannot honestly say I

would not either without --

MR. KLEIN: I guess what I am asking, are you so shocked by that that it would move you no matter what you heard in the case what arrgavating circumstances you may hear?

MS. MOODY: I don't think I would.

MR. KLEIN: Move you to recommend death automatically?

MS. MOODY: No, I don't think so.

THE COURT: Thank you, ma'am.

MS. SKILES: Thank you.
(Whereupon, Miss Moody left the jury room.)

THE COURT: Any motions, State or Defense?
MR. GEESEY: No, Judge.

MR. KLEIN: No.

THE CLERK: Number 602, James Palmer.

THE COURT: Have a seat. How are you doing? Where do you live, Mr. Palmer?

MR. PALMER: South Bay.

THE COURT: Long drive for you today.

MR. PALMER: Long drive.

THE COURT: All right, Mr. Palmer, do I know you; do you know me?.

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, CRIMINAL DIVISION
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA,

vs. CASE NO: 87-6736 CF A02
88-11116 CF A02

WILLIAM VAN POYCK,

Defendant.

_____/

VOLUME V

JURY TRIAL

BEFORE THE HONORABLE MICHAEL MILLER

Room 315
Palm Beach County Courthouse
West Palm Beach, Florida
Monday, October 31, 1988
Beginning at 1:35 o'clock, p.m

MS. MOODY: I read about it originally when it happened. The names mean nothing.

THE COURT: That was a while back?

MS. MOODY: Uh-huh.

THE COURT: Did anything you read stick with you to the extent that you would say you would be unable to sit on the jury in this case and render a verdict on this case based solely on the evidence you hear in the courtroom and the instructions of the law?

MS. MOODY: I don't think so. Nothing I can think of.

THE COURT: Nothing really sticks with you that you read then?

MS. MOODY: No. It was a terrible thing but I do not know.

THE COURT: Safe to say you have not prejudged anybody as being guilty or not guilty for it and you would wait to judge them until you hear all of the evidence?

MS. MOODY: Yes.

THE COURT: All right, in this case if a person

is convicted of first degree murder, ma'am, they can receive one or two sentences, either life or death. And what happends in the second part of the trial, the jury hears aggravating circumstances or evidence and mitigating. What that means, and then they make a recommendation, they vote a recommendation to me of either death, life in prison, and I impose the sentence.

The recommendation is something I would strongly consider. However, would you say you are for the death penalty, against the death penalty or neutral?

MS. MOODY: If they are guilty, I am for.

THE COURT: Absolutely?

MS MOODY: If they are guilty, yes.

THE COURT: Let me ask you this. Would you follow the instructions on the law I give you if those instructions on the law say that the mitigating circumstances are such you should recommend life, would you do that?

MS. MOODY: Yes.

THE COURT: Then the opposite, if you heard the evidence and the instructions on the law said aggravating circumstances, or such you should recommend death, would you do that?

MS. MOODY: Yes.

THE COURT: In other words, you do not feel you would do one automatically or the other automatically, you would listen to all of the instructions on the law?

MS. MOODY: Uh-huh.

MR. GEESEY: Ma'am, would you be fair to both sides then?

MS. MOODY: Yes.

MR. GEESEY: 'Cause it would not be fair to the State if the jury recommended life in every case. It would not be fair to the Defendant if the jury recommended death in every case. That wouldn't be right, would it?

MS. MOODY: No, it would not, but I would expect that, in other words, I am listening to the judge and the evidence.

MR. GEESEY: That's what you would make your

decision on.

MS. MOODY: Yes.

MR. GEESEY: At the end of the trial, based upon his instructions and the evidence that has been presented to you?